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GOPALA KRISHNAN CHETTIAR MUTHU v. SEALAND MARINE INSPECTION AND TESTING (M) SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
S NANTHA BALAN JCA
B SEE MEE CHUN JCA
[CIVIL APPEAL NO: W-01(A)-419-09-2020]
5 OCTOBER 2022

C **Abstract** – *Whether a claimant is a workman within the meaning of s. 2 of the Industrial Relations Act 1967 is a mixed question of law and fact for the Industrial Court to decide. Merely being a company 'director' does not preclude an individual from carrying out functions and duties as an employee and to be remunerated as such. In those circumstances, the label of 'director' will take a backseat and the Industrial Court would* D *forensically examine the nature and functions of the person to determine whether he was working under a contract of service ie, workman, or under a contract for services ie, independent contractor.*

E ***ADMINISTRATIVE LAW:*** *Judicial review – Certiorari – Appeal against – High Court granted order of certiorari to quash Industrial Court award – Claimant brought into company as director and shareholder – Claimant given pre-prepared resignation letter by directors of company and access card and emails blocked – Whether claimant dismissed without just cause or excuse – Claimant's role in company – Whether workman/employee despite holding position as director and* F *shareholder of company – Whether in total control and worked independently – Whether carried out functions or duties as workman in capacity as 'operations director'*

WORDS & PHRASES: *'workman' – Industrial Relations Act 1967, s. 2 – Claimant brought into company as director and shareholder – Claimant paid* G *remuneration per month subject to deduction for statutory contributions to Employees' Provident Fund and Social Security Organisation – Whether indicator that claimant was employee – Whether claimant workman/employee of company despite holding position as director and shareholder of company*

H This was an appeal against the decision of the High Court in allowing an application for judicial review by the first respondent ('company') and granting an order of *certiorari* to quash the award by the second respondent ('Industrial Court'). The appellant had previously worked at Links Survey (M) Sdn Bhd and was known to one Sathiaseelan ('Sathia'), one of the directors/shareholders of the company, long before the appellant joined the I company. The appellant was brought into and joined the company on 3 November 2016 due to his vast experience in marine cargo surveying and

loss adjusting. He was appointed to the board of directors of the company and was given 20,000 shares in the company. The appellant did not pay for the shares. In March 2019, some of the staff had given their letters of resignation, blaming the appellant as being the cause of their resignation. The staff, in their respective resignation letters, stated that they could not stand the pressure, stress and mental torture by the appellant. The appellant stated that (i) he was not shown these letters when he was confronted by Sathia and another director, Ong; (ii) the meeting with Sathia and Ong was tense and they were hostile to the appellant. Ong forcefully gave the appellant a 'pre-prepared resignation letter' to sign but the appellant refused to do so and walked away; (iii) he could not enter the office as his access card was blocked without his knowledge; and (iv) his emails were blocked and he was removed from various work-related WhatsApp groups. The appellant lodged a police report against the company and went on to describe what transpired in the meeting. The next day, the appellant's wife received three boxes at her workplace which she suspected contained the appellant's belongings. The appellant wrote to the board of directors of the company, demanding a formal explanation on his status. The company sent a notice to the appellant, informing him that the company had ceased business operations and that the company would be closing in due course. The company further submitted a purported members' resolution and an undated letter to the Companies Commission of Malaysia in relation to the application for the company to be struck off the register. The appellant then sent a letter to the company secretary regarding the above matter and the company secretary replied that: (i) there were no instructions nor resolutions for closure of the business operations; and (ii) the company's records still showed that the appellant was a director and member of the company. The appellant considered himself to have been dismissed without just cause or excuse. Aggrieved by the events, the appellant initiated statutory process and lodged a complaint with the Director General of Industrial Relations. The matter was referred to the Industrial Court. There was considerable dispute before the Industrial Court as to the appellant's role and whether he was in total control and worked independently and brought in to develop the company's business and bring in new clients, apart from servicing existing clients. The appellant maintained that he (i) was not in total control of the company and that sales and marketing were not part of his portfolio as he was brought in to be in charge of operations; (ii) had closely monitored the job allocations to the staff and the drafts of the survey reports which he received from the surveyors (staff) after the survey jobs had been completed; (iii) had arranged a few internal and external trainings and certification programmes to improve knowledge and skills of the staff; and (iv) provided a list of potential clients for marketing purposes and secured several opportunities for the company through personal contacts. It was also not disputed that the appellant was paid a sum of RM20,000 per month which was subject to deductions for

A statutory contributions to the Employees' Provident Fund ('EPF') and the Social Security Organisation ('SOCSO'). The company contended that: (i) nothing hinged on the appellant's EPF and SOCSO contribution and this did not indicate that he was an employee; (ii) evidence of payments was by way of a director slip which denoted that the payment was by way of
B 'director's fees and the slip did not show any staff number for the appellant. The absence of the staff number in the appellant's slip was consistent with the fact that there was no contract of employment and as such, the appellant was not an employee of the company and did not fall within the definition of 'workman' as per s. 2 of the Industrial Relations Act 1967 ('Act'); (iii) the
C appellant's claim that he was a workman who had been dismissed without just cause and excuse was an afterthought and contrived in order to seek remedies in the Industrial Court. If he was aggrieved by his removal as director, he should have pursued his remedies as provided for in the Companies Act 2016; and (iv) the appellant was guilty of misconduct. The Industrial Court handed down an award in favour of the appellant, ruling
D that: (i) the appellant was a 'workman' per the definition in s. 2 of the Act; (ii) the appellant had been dismissed without just cause or excuse; and (iii) the company be ordered to pay RM320,000 as back wages and compensation *in lieu* of reinstatement. The company applied to the High Court for judicial review to have the award quashed *via* an order of *certiorari*.
E The High Court held that the appellant was not a workman and that in relation the appellant's misconduct, the award suffered from the '*Wednesbury* unreasonableness'. Hence, the present appeal.

Held (allowing appeal; setting aside High Court order and reinstating award of Industrial Court)

F **Per S Nantha Balan JCA delivering the judgment of the court:**

(1) The Industrial Court, which examined the functions of the appellant, was correct to find that although the appellant was a director/shareholder, he was nevertheless carrying out functions or duties as a
G workman in his capacity as 'operations director'. There was no evidence that he was removed as a director of the company. It was undisputed that the appellant was in fact removed/terminated – which could only mean that he was removed/terminated as an operations director *ie*, as a workman. There was no evidence that the appellant was an independent contractor. The question as to whether the appellant was a workman or
H not was a mixed question of law and fact for the Industrial Court to decide. The High Court ought not to have readily interfered with the Industrial Court's finding that the appellant was a 'workman'. The Industrial Court's finding was not irrational or perverse. Further, the Industrial Court's findings that the appellant was a workman and that he
I had been dismissed without just cause or excuse were findings which were, in the circumstances, immune from being vitiated *via* judicial

review unless it could be demonstrated that the Industrial Court had committed 'errors of law'. There were no errors of law. (paras 66, 68 & 79)

(2) The appellant was not given the 'heads-up' on matters that were said to be brewing and was literally 'ambushed' and cornered into a situation where he was confronted with a barrage of allegations and asked to tender his resignation but he refused and rightly so. Even if the appellant had signed the resignation letter which the company had prepared for him, it would not preclude him from prosecuting a claim based on constructive dismissal as the resignation letter would have been regarded as a document which was procured under oppressive circumstances. It was obvious that Sathia and Ong had decided that the appellant should leave the company and this was proven by the fact that they had asked the appellant to join the meeting whilst having in their hand a resignation letter for the appellant to sign. If he was being asked to resign, then it was relevant to ask: resign as what? It was also relevant to ask, if the appellant was, as the company contended in 'total control' and the 'directing mind and will', how was that although he held 20,000 shares, the others could try and compel the appellant to sign on a pre-prepared resignation letter and could effectively drive him off the company's premises. The company went a step further and announced to the marine survey community that the appellant had been terminated/removed. It was obvious enough that the company was determined to announce to all the relevant stakeholders that the appellant had 'fallen from grace'. From the circumstances, it was apparent that he was being asked to leave his position as the director of operations. There was no position in the board of directors as 'director of operations'. The appellant, although a shareholder and director, was in reality, an employee carrying out executive functions as director of operations. (paras 70-74)

(3) The fact that the director slip did not indicate any staff number for the appellant did not detract from the undeniable fact that he was running the operations of the company but his job scope was limited. There was no evidence that the appellant had discharged any corporate duties as would be the case if he was truly a director. There was no explanation by the company worthy of any consideration regarding the description of 'basic pay' in two of the appellant's director slips. There was no evidence to establish, on a balance of probabilities, that the appellant had voluntarily agreed for deductions to be made towards the EPF contributions. (paras 76 & 77)

(4) As for the issue of the appellant's alleged misconduct, whether the evidence of the staff of the company who had all testified against the appellant at the hearing was credible or should be rejected was a matter for the Industrial Court to decide. In this case, the Industrial Court had

implicitly rejected the evidence of the witnesses who testified for the company in relation to the appellant's alleged behaviour and interaction. The High Court should not have interfered with the findings of facts. (paras 90 & 91)

Case(s) referred to:
Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 CA ***(refd)***
Assunta Hospital v. Dr A Dutt [1980] 1 LNS 121 FC ***(refd)***
Chong Kim Sang v. Metatrade Sdn Bhd [2004] 2 CLJ 439 CA ***(refd)***
Dr A Dutt v. Assunta Hospital [1981] 1 LNS 5 FC ***(refd)***
Gopala Krishnan Chettiar Muthu v. Sealand Marine Inspection And Testing (M) Sdn Bhd [2019] 2 LNS 2245 ***(refd)***
Henry Eliathamby v. Tootpay Sdn Bhd [2018] 4 ILR 22 ***(refd)***
Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***
Inchcape (M) Holdings Bhd v. RB Gray & Anor [1985] 2 CLJ 305; [1985] CLJ (Rep) 132 SC ***(refd)***
Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777 SC ***(refd)***
Maritime Intelligence Sdn Bhd v. Tan Ah Gek [2021] 10 CLJ 663 FC ***(refd)***
Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***
Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***
Rajathurai Suppiah v. Starship Agencies Sdn Bhd [2015] 1 LNS 1013 HC ***(refd)***
Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 2, 20(1)
Rules of Court 2012, O. 53 r. 3(2)

For the appellant - L Nagarajan & S Lavenyia; M/s Gulam & Wong
For the respondent - Christie Soosay Nathan & Jusween Kaur; M/s Christie Soosay Nathan & Assocs

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: WA-25-495-10-2019 (overruled).]

Reported by Lina E

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] This is an appeal by Mr Gopala Krishnan Chettiar Muthu ("appellant") against the decision of the learned judge of the High Court dated 29 July 2020 ("judge") in allowing an application for judicial review by Sealand Marine Inspection and Testing (M) Sdn Bhd (Company No 1207748-U) ("the company") and granting an order of *certiorari* to quash the Industrial Court of Malaysia Award No 2245 of 2019 dated 8 August 2019 ("the award").

[2] The issue which featured prominently in the appeal before us was whether the appellant, although a director and shareholder of the company, was also a "workman" per the definition in s. 2 of the Industrial Relations Act 1967 ("the Act"). In this regard, the Industrial Court precisely framed the question as follows:

> [21] The central question that this Court needs to determine is whether the Claimant who holds the position as a Director and shareholder of the Company in his capacity as an Operation Director is also a workman/employee of the Company?

[3] Based on the evidence that was adduced, the Industrial Court ruled that the appellant was a "workman" and that he had been dismissed without just cause or excuse. The Industrial Court ordered compensation in the sum of RM320,000 to be paid by the company to the appellant. The company challenged the award by a judicial review application. The High Court granted *certiorari* and quashed the award. The appellant appealed to this court.

[4] On 5 October 2022, we allowed the appeal and set aside the High Court's order dated 29 July 2020. We reinstated the award of the Industrial Court. We ordered costs of RM20,000 (subject to allocator) to the appellant as costs here and below. Our reasons for allowing the appeal now follow.

Background

[5] The appellant had previously worked at Links Survey (M) Sdn Bhd. He had been involved with the logistics and shipping industry since 1998 and was experienced in marine cargo surveying and loss adjusting. The appellant's experience was relevant to the company's core business, which is marine cargo surveying and inspection. The appellant was known to one Sathiaseelan ("Sathia") long before he joined the company which was incorporated on 3 November 2016. Sathia was a director/shareholder and the executive director of the company.

[6] Apart from the appellant and Sathia, the other directors in the company were Ong Keng Hsing ("Ong"), SM Malarshobaa ("Malarshobaa"), and David Rajan Padman ("David"). It is relevant to mention also that the company was associated with two other companies namely, Northwest Marine Sdn Bhd (Co. No. 944374-U) ("Northwest") and Sealand Marine and Inspection (M) Sdn Bhd (Co. No. 723806-W) ("old Sealand"). Sathia, Ong and Malarshobaa are also directors in Northwest and old Sealand. All or most of the staff who worked at the company were from old Sealand. After the appellant's removal/termination on 12 March 2018, the company closed down and ceased business, the staff (*sans* the appellant) were absorbed into employment by Northwest.

[7] The shareholding in the company was as follows:

	Shares	Percentages (%)
Ong	15,000 shares	15%
Appellant	20,000 shares	20%
Malar	15,000 shares	15%
Sathia	35,000 shares	35%
David	15,000 shares	15%

[8] The appellant joined the company on 3 November 2016. The appellant was appointed to the board of directors of the company and was "given" 20,000 shares in the company. He did not pay for the shares. It seems that the appellant was brought into the company because of his vast experience in marine cargo surveying and loss adjusting.

[9] There was considerable dispute before the Industrial Court as to the appellant's role, and whether he was in total control and worked independently and brought in to develop the company's business and bring in new clients, apart from servicing existing clients. The appellant maintained that he was not in total control of the company and that sales and marketing was not part of his portfolio as he was brought in to be in charge of operations.

[10] The appellant testified that he had closely monitored the job allocations to the staff and the drafts of the survey reports which he received from the surveyors (staff) after the survey jobs had been completed. He said that the survey reports were thoroughly vetted and finalised before submission to the clients. He also said that he had arranged a few internal trainings, external trainings and certification programmes to improve knowledge and skills of the staff.

[11] The appellant also testified that he had provided technical support to the Marketing Department to secure businesses in Malaysia and Singapore. He also accompanied top management of the company for the 15th Asean Ports and Shipping 2017 Exhibition and Conference in Myanmar to support new business initiatives at the event and participated in discussions organised by the company's associate, Bollard Solution with local exporters. He had placed the company in the vendor list of a Government Linked Company (GLC) namely Padi Beras Nasional Berhad to participate in future tenders. He also provided a list of potential clients for marketing purposes and secured several opportunities for the company through personal contacts.

[12] At any rate, it is not disputed that the appellant was paid a sum of RM20,000 per month which was subject to deduction for statutory contribution to the Employees' Provident Fund ("EPF") and the Social

Security Organisation ("SOCSO"). The appellant maintained that although he was a shareholder and director, he was carrying out functions and duties as an employee and paid a monthly "salary" of RM20,000. The company took the position that the appellant was not a "workman" as he did not have a contract of employment and was not an employee, and that the monthly payment of RM20,000 was payment of "director's fees".

[13] The company also contended that nothing hinged on the appellant's EPF and SOCSO contributions and this did not indicate that he was an employee as the other directors also made these contributions but they do not claim to be employees of the company.

[14] The company highlighted that evidence of payments was by way of a director's slip ("slip") which denoted that the payment was by way of "director's fees" and that the slip did not show any staff number for the appellant whereas the slips of the employees *eg*, Jamaluddin bin Wahab and Shamsul Bahri bin Mohd Ariffin, showed staff numbers SMI 050 and 070 respectively. According to the company, the absence of staff number in the appellant's slip was consistent with the fact that there was no contract of employment, as such, and the appellant was not an employee of the company.

[15] At this juncture, it is necessary to highlight that the appellant's slip dated 25 January 2017 showed that the appellant was paid RM20,000 as "director fees" but the slips dated 27 February 2017 and 28 March 2017 showed that RM20,000 was paid as "basic pay". We will return to this aspect of the evidence later on in this judgment.

Meeting On 12 March 2018

[16] We turn now to the events which took place on 12 March 2018 at the premises of the company which culminated in the appellant being terminated/removed and barred from the premises of the company. Before we look at what happened on 12 March 2018, it is necessary to also have regard to the events prior to that date. All these events may be chronologically narrated as follows:

(i) on 9 March 2018, an internal meeting was scheduled between the appellant and Sathia pertaining to assigning of staff on a rotation basis to the branch office in Port of Tanjung Pelepas. This meeting did not take place. The appellant, however, messaged Sathia to remind him that he had an appointment in the afternoon and was told to go ahead with his appointment. Sathia said that he will speak to the appellant on Monday 12 March 2018.

(ii) on 9 March 2018, some of the staff had given their letters of resignation, which were all dated 9 March 2018 and wherein they had blamed the appellant as being the cause of their resignation. The staff,

namely, Partiban (COW6), Veveganathan (COW8), Prem Kumar (COW7), S Mathanakumar (COW5) and Logeswary Krishnan (who did not testify at the Industrial Court) stated in their respective letters that they wished to resign as they could not stand the pressure, stress and mental torture by the appellant. However, the appellant was not shown with letters of resignation when he was subsequently confronted by Sathia and Ong on 12 March 2018. Before the Industrial Court, the appellant said that he was not shown the resignation letters previously.

(iii) in his resignation letter Mathanakumar said, "I have been extremely depressed due to work pressure from the operation director Mr Krishnan. The amalgamation of these have wreaked havoc on my mental and emotional health, and is threatening to affect my work. I believe that it is in the best interest of both me and the company that I resign from my position so that no harm is done on either side."

(iv) Prem Kumar's resignation letter stated that, "However, I regret that, due to circumstances beyond my control, I need to resign right away due to the stress, pressure and mental torture given by my operation director. So I request you to accept my resignation letter."

(v) Veeveganathan's resignation letter read as, "The reason behind my resignation is due to the stress, pressure and mental torture given by my operation director. So I have decided to resign this job."

(vi) in his resignation letter, Parthiban said that he appreciated and enjoyed the work but had to resign because "… I cannot continue working in the environment provided because of the pressure, stress and mental torture given by my operation director Mr Gopala Krishan."

(vii) Logeswary a/p Krishnan's resignation letter read as, "I am resigning from my position due to work pressure, stress and mental torture given by my operation director."

(viii) on 10 March 2018, the appellant reported to the office as usual to finalise and forward a survey report to the company's esteemed client within the timeframe.

(ix) on 12 March 2018, upon reaching the office in the morning, the appellant met Sathia and Ong and accompanied them for breakfast. At about 10.30am, Ong called the appellant to join him and Sathia in a meeting room for a staff discussion. At this meeting, certain employees of the company were called into the meeting room where serious allegations were made against the appellant. The appellant, denied these allegations.

(x) at the meeting, Sathia alleged that:

(a) that appellant had offered some money to Prem Kumar to beat up Kalaiselvan (accounts executive);

(b) that the appellant had beaten up a staff called Farol and forced him to resign;

(c) that all staffs were tendering resignations due to work pressure from the appellant;

(d) that a staff named Logeswary had a miscarriage because of work pressure;

(e) that the appellant had bad mouthed the other directors and was quoted as having said to Prem Kumar that their marketing performances are weak;

(f) that the appellant did not respond to some client's enquiries but no further details on that were given.

(xi) Ong and Sathia told the appellant that the respective staff who lodged their complaint had made a police report and had also lodged a complaint with the Labour Department.

(xii) further, the appellant said that Ong forcefully gave him a "pre-prepared resignation letter" to sign but the appellant refused to do so and walked away.

(xiii) according to the appellant, the situation at the meeting was tense and that Sathia and Ong were "hostile" towards him.

(xiv) yet further, Malarshobaa who just arrived at that time also asked the appellant to sign the resignation letter but the appellant again refused to sign and walked away from the office for a short break.

(xv) later, the appellant's access card to the office was blocked without his knowledge and therefore the appellant could not enter the office.

(xvi) the appellant's emails were suddenly blocked and he was removed from various work-related WhatsApp groups.

(xvii) on 13 March 2018 at about 11am, the appellant received several phone calls from a group of friends in the marine surveying community and he was informed about an email from the company which stated as follows:

> This is to inform that **Mr. Krishnan has been removed/ terminated** from Sealand Marine Inspection and Testing effective from 12.03.2018. **He does not represent the organization anymore.** Please remove him from your mailing lists. (emphasis added)

Appellant's Police Report – 13 March 2018

[17] On 13 March 2018, the appellant proceeded to Ibu Pejabat Polis Daerah Klang to lodge a police report (Report No. 002462/18) on the incident which took place on 12 March 2018. In that report, the appellant

described himself as "Pengarah Urusan" and went on to describe in some detail as to what had transpired at the meeting. He concluded his police report by stating,

> I am making this report for my own safety as a cover report because the directors have conspired against me and have also made arrangements with other employees/staff to conspire with the directors motive to go against me. This has led to the situation to a Constructive Dismissal and unlawful removal of me as a Director (not in practice guideline and not recognised as statutory requirements of Company Act 2016).

[18] On 14 March 2018, the appellant's wife Dr Sudha Rawat from Hospital KPJ Klang received a phone call from the hospital reception counter that three boxes had been delivered to her by two unknown Indian men. She suspected that the contents of the boxes belonged to the appellant. A police report was lodged at the Bandar Baru Klang police station on the same day.

Appellant's Letter – 21 March 2018

[19] The appellant sent a letter dated 21 March 2018 to the board of directors of the company which was copied to the company secretary demanding a formal explanation on the appellant's status. The appellant's letter read as follows:

> Gopala Krishnan Chettiar a/l Muthu
> NRIC 690827-10-6083
> 2X Lorong Air Lombong
> Hotspring N/V, Setapak,
> 53200 Kuala Lumpur,
> Wilayah Persekutuan
>
> 21 March, 2018
>
> SEALAND MARINE INSPECTION AND TESTING (M) SDN. BHD. (1207748-U) ("The Company")
> 38-2, Jalan Tiara 2C
> Bandar Baru Klang
> 41150 Klang,
> Selangor
>
> Dear Board of Directors of the Company,
>
> Copied to the Company Secretary
> Liew Ngeok Phong (NRIC: 521003-10-5961)
> 2, Jalan Bukit Permai 3,
> Taman Bukit Permai,
> 58100 Cheras,
> Wilayah Persekutuan
>
> **Re: Forced Eviction And Constructive Dismissal Of A Director**
>
> Reference is made to the above matter.

I also make reference to an unscheduled and informal discussion of staffs, which comprises of 2 directors on 12 March, 2018. At this informal discussion, allegations were thrown on me for some matters without seeking further clarifications from me.

For record purposes, I as named above was appointed as a member of the Board of Directors of the Company and also a shareholder of the Company.

Without further notice, I was denied access to the office, office e-mail was blocked and was not allowed to access to my personal belongings which was confidentially kept in my office room.

Please take note that a police report has been lodged with regards to the above matter.

I would like to bring to the Company's board of directors attention on the above informal discussion and decisions undertaken by the Company on 12 March, 2018; and subsequent effect has violated the principal and the statutory provisions of the Companies Act 2016 and has breached the precedent Company law pertaining to the statutory standing of a director.

I seek the Company's board of directors' formal explanation on my status as a director and as a shareholder of the Company, with an official explanation in writing by the Board of Directors of the Company. Failing to respond to me within 3 working days, I am left with no option but to bring this matter to the Registrar of Companies, Malaysia and to proceed with legal action, against the Board of Directors of the Company.

Best regards.

Gopala Krishnan Chettiar a/l Muthu

CC Registrar of Companies, Companies Commission of Malaysia

Company's Letter – 23 March 2018

[20] The company sent a notice to the appellant on 23 March 2018 informing him that the company had ceased business operations effective 31 March 2018 and that the company would be closing down in due course. At the hearing before us on 5 October 2022, counsel for the company confirmed that the company was still in existence and had not been struck off or wound up.

[21] It is noted that the company had submitted a purported members' resolution and undated letter to the Companies Commission of Malaysia ("CCM") in relation to the application for the company to be "struck off" the register. But it would appear that this was not acted upon by CCM. The company's letter reads as follows:

Date: 23 March, 2018

To All Staff, Directors & Share Holder of The Company

Dear Sir/Madam

Closure Of Operations

We refer to the meeting held on 12/March/2018 whereat some staff members' attended, with the directors, *viz*, Sathiaseelan a/l T. Vijiyanthran, Ong Keng Hsing and Gopala Krishnan Chettiar a/l Muthu.

The Company have since received a letter from Gopala Krishnan Chettiar a/l Muthu. The directors have discussed the matter and now wish to formally inform you the following. Since commencement of operations back in 05 November, 2016 the company has received financial support from Northwest Marine Sdn Bhd (NWM). After more than 1 year in operation, the company continues to be loss-making. It is unfair for NWM and its shareholders to continue providing financial support to this loss-making company.

In the light of the foregoing and the contentious meeting of 12/March/2018, the directors signing this letter below, have agreed to close the company's business operations effective 31/March/2018.

The company will (subject to verification) honor all salaries, allowances, deductions and benefits accrued up to the end of this month, for all staff and directors.

The directors in due course, will proceed to initiate formal closing of the Company and to inform all concerned.

Yours sincerely

Sealand Marine Inspection and Testing (M) Sdn Bhd

Sathiaseelan a/l T. Vijiyanthran
SM Malarshobaa a/p Manoharan
Dato' David Rajan Padman
Ong Keng Hsing

Appellant's Letter to Company Secretary – 10 April 2018

[22] The appellant sent a letter dated 10 April 2018 to the company secretary, Liew Ngeok Phong. The letter was copied to the other directors and shareholders. The appellant's letter read as follows:

Gopala Krishnan Chettiar a/l Muthu
NRIC: 690827-10-0083
2X, Lorong Air Lombong, N/V
Setapak
53200 Kuala Lumpur
Wilayah Persekutuan

10 April, 2018

Liew Ngeok Phong (Company Secretary)
NRIC 521003-10-5961
18, Lorong 6A/91
Taman Shamelin Perkasa
50100 Kuala Lumpur
Wilayah Persekutuan

Dear Sir,

Re: Sealand Marine Inspection And Testing (M) Sdn. Bhd. (1207748-U)

1. Closure of Business Operation; and
2. Denial of Access to the Office, by the Board of Directors of the Company, and
3. Citing the Company's Resolution and Register Books.

Reference is made to the above matter.

I, Gopala Krishnan Chettiar a/l Muthu as addressed above was appointed as a Director and registered as a Member of Sealand Marine Inspection And Testing (M) Sdn Bhd. (1207748-U) ("the Company").

I would like to seek clarification and your guidance as the appointed Company Secretary of the abovementioned Company, for the following mentioned matters below:

1. Enclosed herewith is a Notice dated 23 March, 2018 from the Board of Directors of the Company pertaining to the closure of business operation. Please clarify was there any Board of Directors Meeting called for the above. If so, was there a Notice calling for the Board of Directors Meeting circulated to all the Directors, Alternatively, was there a Circular Resolution circulated to all the Directors to approve the closure of business operation as stated in the Notice as circulated by the Directors, as mentioned above. If yes, I would like to cite the original of the Notice of the Board of Directors Meeting or Circular Resolution, and to be provided with the copies of the said documents which were approved by the Board of Directors.
2. Please take note, at the staff meeting on 12 March, 2018, without further notice, I was denied access to the office, office emails was blocked, further I was not allowed to access to my personal belongings which was confidentially kept in my room. *I being as the working Director of the Company also known as Operations Director was unable to perform my duties since 12 March, 2018 until to a current date.* Kindly advise me, what is my status in the above mentioned Company.
3. Kindly take note that I shall visit the registered office to cite all the Board of Directors and Shareholders Minutes book and the Register Books of the Company as permitted by the Companies Act 2010. I would also request for copies of the minutes and resolutions for my records. Do take note that was not given any copies of the

A resolutions and minutes of the Company since my date of appointment as a Director, since the incorporation date of the Company. Please do not hesitate to call me at 017-8810050 and let me know the cost incurred for the above citing of records and furnishing copies of minutes/resolutions. I look forward in receiving your respond as the appointed Company Secretary of the above B mentioned Company, officially in writing within 14 days upon receiving this letter.

Best regards,

Gopala Krishnan Chettiar a/l Muthu

C cc. The Board of Directors of the Company
cc. The Shareholders of the Company (emphasis added)

Company Secretary's Letter – 12 April 2018

[23] The company secretary replied *via* letter dated 12 April 2018 which D reads as follows:

Liew Nguok Phong
18 Lorong 6A/91,
Taman Shamelin Perkasa
56100 Kuala Lumpur

E 12/April/2018

Mr Gopala Krishnan Chettiar a/l Muthu
2X Lorong Air Lombong,
Hotspring NV, Setapak,
53200 Kuala Lumpur

F Dear Sir

Sealand Marine Inspection And Testing (M) Sdn Bhd (1207748-U)

I refer to your letter of 10/April/2018 in respect of the abovenamed company.

G My response is as follows

1. There was no notice dated 23/March/2018 enclosed, I was not instructed to convene a Board Meeting on the closure of business operation. Neither was there any Instructions to prepare and/or to circulate a Board resolution to approve closure of business operations of the company.

H

2. As to the outcome of the 12/March/2018 meeting, the company's records show that you remain as a director and member of the company.

On the matter of your request to call at the Company's Registered Office, I to take copies of the Company's statutory, you can do so in the morning of Friday, 20/April/2018. Charge per sheet photostated is RM0.50 cents.

> Your letters addressed to the Board of Directors and shareholders will be forwarded to the company's business address, for distribution, together with the copy of this letter.

[24] The appellant was understandably aggrieved by the events that occurred on 12 March 2018 and the unenviable situation in which he found himself, and considered himself to have been dismissed without just cause or excuse. The appellant initiated the statutory process by lodging a complaint with the Director General of Industrial Relations under s. 20 of the Act. Essentially, the appellant claimed that he was a "workman" and that he had been dismissed (constructively dismissed) without just cause or excuse by the company and entitled to reliefs as provided under s. 20 of the Act.

Statutory Definition Of "Workman"

[25] Section 20(1) of the Act states that:

> Where a **workman**, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed". (emphasis added)

[26] Section 2 of the Act defines "workman" as:

> any person, including an apprentice, **employed by an employer** under a **contract of employment** to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute. (emphasis added)

[27] Section 2 defines "contract of employment" as:

> **any agreement, whether oral or in writing** and whether **express or implied,** whereby one person **agrees to employ another as a workman** and that **other agrees to serve his employer as a workman.** (emphasis added)

Pleadings – Statement Of Case

[28] Before the Industrial Court, the appellant formulated his complaint of dismissal without just cause or excuse per his statement of case as follows:

> **Statement Of Case**
>
> 1. The parties to the dispute are Gopala Krishnan Chettiar a/l Muthu (hereinafter referred to as "the Appellant") and Sealand Marine Inspection and Testing (M) Sdn. Bhd. (hereinafter referred to as "the Company").

2. The dispute has been referred under Section 20(3) of the Industrial Relations Act 1967 to the Industrial Court by the Minister of Human Resources.

3. The Appellant is in logistics and shipping industry since February 1998 and has vast knowledge and experience in marine cargo surveying and loss adjusting. The Appellant previously worked at Links Survey (M) Sdn. Bhd. as Operations Manager for 12 years.

4. The Appellant joined the services of the Company on 12/12/2016 with a salary of RM20,000.00 per month as Operations Director by salary. See Pay slips from the Company for January 2017, February 2017 and March 2017 marked as ATTACHMENT C-1.

5. The Appellant also one of the shareholder for the Company. See SSM Search for the Company dated 13/03/2018 marked as ATTACHMENT C-2.

6. The Company paid an allowance of RM2,087.00 for monthly car instalment. See Statements of Account issued by Public Bank from January 2017 until December 2017 marked as ATTACHMENT C-3.

7. The Company also paid for the Appellant's mobile usage as per Maxis bill during the tenure of his employment.

8. The Appellant's last drawn salary was RM 20,000.00.

9. During the Appellant's tenure at the company, as Operations Director, the Appellant had arranged a few internal trainings, external trainings and certification programs to improve knowledge and skills of the staff of the Company. The Appellant also provided technical support to the Marketing Department in attempts to secure businesses for the Companies in Malaysia and Singapore and accompanied the top management of the Company for the 15th Asean Ports and Shipping 2017 Exhibition and Conference in Myanmar to support new business initiatives at the event and discussions organized by the Company's associate, Bollard Solution with local exporters.

The Appellant has placed the Company into the vendor list of GLC namely Padiberas Nasional Berhad to participate in future tenders. The Appellant also provided a list of potential clients for marketing purposes and secured several job opportunities for the company through personal contacts.

...

29. The Appellant says at all material times his work's performance was proper and the Appellant denies all allegations and accusations made towards him.

30. The Appellant contends and will so contend that he was dismissed without just cause or excuse and that his dismissal was effected in violation of the principle of natural justice.

31. The Appellant will further contend that the decision to dismiss him was motivated by *mala fides*, unfair labour practice and an act of victimization.

32. The Appellant will also contend that the decision to dismiss him was arbitrary, capricious, harsh unjust, unreasonable and against all notions of equity and good conscience.

33. The Appellant shall produce oral and documentary evidence during trial to support all facts stated herein.

34. In the view of the provisions of Rule 10(3) of the Industrial Court Rules 1967, the Appellant hereby reserves the right to introduce further relevant documents after having sight of the Statement in Reply of the Company.

35. In the premises, the Appellant humbly prays for an Order that:

    a. The Appellant's termination as a as Operations Director by the Company was carried out without reasonable excuse or proof, unjust, illegal and breached the procedures of labour law and/ or violated the rules of natural justice;

    b. The Appellant to be reinstated to his former position without loss of seniority, wages or benefits, monetary or otherwise;

    c. Arrears of salary and allowance from the date of dismissal to the date of reinstatement:

    d. Damages other than compensation *in lieu* of reinstatement;

    e. Any other damages or relief in which the court thinks and deemed fit.

Pleadings – Statement In Reply

[29] The company's response per the statement in reply was as follows:

Statement In Reply

Preliminary Objection

1. The Company shall raise a preliminary objection. Under Section 20 of the Industrial Relations Act 1967 ("IRA 1967"). an employee can file a representation to the Director General of Industrial Relations within 60 days of his unfair dismissal. If a settlement or reconciliation could not be achieved, the matter will be referred to Minister of Human Resources with the discretion to refer the matter to the Industrial Court.

2. The Company contends that the Minister has erred in referring the case to the Industrial Court. *The Appellant was never the employee of the Company. The Appellant is a director and shareholder of the company since the date of incorporation and therefore does not fall within the meaning of workman as defined in Industrial Relations Act 1967. As stated in paragraphs 4 and 5 in the Statement of Case, he joined the company as a*

shareholder and an Operational Director tasked with handling operations of the company. Therefore, this Honourable Court is not seised with the jurisdiction to hear this case.

3. Further, *there is no employment contract in place between the Appellant and the Company. The Appellant is director and shareholder of the Company and exercised control over the whole operations of the Company.*

4. With reference to attachment C-5, it can be seen in last paragraph of the police report, the Appellant has stated that the 'This has led the situation to a – Constructive Dismissal – and unlawful removal of me as a Director ...'. This also shows that the Appellant has been treating himself as a Director of the Company rather than an employee.

5. Further, under attachment C-7, it is also stated by the Appellant that he is a shareholder and director of the Company. Even so in the letter the Appellant wrote to the company secretary and enquired of his status as a Director and Shareholder but not as an employee. It is evident that even the Appellant himself did not regard himself as an employee and by making a representation to the Director General of Industrial Relations is an afterthought.

Reply

6. The Appellant was never an employee of the Company. The Appellant at all material times a director and shareholder of the Company holding 20,000 shares in the Company. The Appellant was at all material times has been paid a Director's Allowance of RM20,000.00 per month, plus car loan allowance of RM2,087.00 plus allowance for mobile phone charges. The Appellant was never paid a monthly salary alleged in paragraph 8 of the Statement of Case which are untrue and denied. This can be further evidenced with the Financial Statements showing his remuneration under the Directors' Remuneration column. *See Trading Profit and Loss for the period 1/11/2016 to 30/09/2018 prepared by the Company – attached 'CO-1'*

7. The Company was incorporated on 3/11/2016 and the Appellant was one of the 4 original subscribers in the Company. He was also one of the First Directors named in the Articles of Association. *See Certificate of Incorporation (Borang 9) 1 Exhibit 'CO-2', and Memorandum of Association of the Company marked as Exhibit 'CO-3', Articles of Association marked as Exhibit 'CO-4'.*

8. The Appellant joined the remaining subscribers to incorporate the Company with a view to develop a profitable business venture, based upon the Appellant's experience in the industry and upon his representations to the remaining shareholders/directors that he was able to secure established and profitable business clientele for the Company.

9. *The Appellant exercised independent control over the Employees of the Company, was responsible for business and policies of the development of the business of the Company in his capacity as the Operations Director. Further, he was a shareholder and had ownership in the Company.*

10. The Company avers that there was no contract of employment in existence for the Company to employ the Appellant and the Appellant did not fall under the category of "workman" as defined under the Industrial Relations Act 1967. Therefore, the Company contends that *the issue of dismissal should not be dealt with in this Court as the Appellant is not an employee of the Company hence this Honourable Court is not seized with jurisdiction to adjudicate this matter.*

11. The Company avers that the Appellant had failed to develop the business and bring in profitable business clients for the Company to develop the business despite time being given by the remaining directors of the Company and was running at a loss. The work handled by the Company was mainly from existing clients referred by the other 2 directors, Sathiaseelan a/l T Vijayanthiran and Ong Keng Hsing and their associated companies. The Company had to obtain advance/loan from its Associated Company, Northwest Marine Sdn Bhd to meet its operation costs every month and as at 31/3/2018, the amount owing by the Company to Northwest, stood at RM980,331.88. See Statement of Financial Position of the Company exhibited and marked as "CO-5"

12. Despite the losses suffered, the remaining directors of the Company did not interfere in the affairs of the Company for the first 6 months. During the Company's half year review which was attended by all the Directors, the remaining directors had given the Appellant an extension of 6 months until December 2017, to improve the business of the Company. However, the Company had continued to incur heavy losses despite the Appellant's assurances.

13. In the event that this Honourable Court finds that the Appellant was indeed a workman and that he was dismissed, the Company avers that the dismissed was valid and made after due and proper inquiry. (emphasis added)

Pleadings – Rejoinder

[30] The appellant sought to repudiate the company's contentions and filed a rejoinder which reads as follows:

Rejoinder

1. This Appellant's Rejoinder is in reply to the Company's Statement in Reply dated 22 October 2018, hereinafter referred to as "the CSR".

Appellant's Reply To The Preliminary Objection

2. Pursuant to the paragraph 1 to paragraph 5 of the CSR, the Appellant denies all allegations and wish to state that:

a. In August 2016, the Appellant was offered by Mr. Sathiaseelan on behalf of the Company (previously known as Sealand Marine Inspection (M) Sdn Bhd) as Operations Director with a salary of RM20,000.00 per month and undertook to prepare the appointment letter. At the material time, Mr. Sathiaseelan informed the Appellant that Sealand Marine Inspection (M) Sdn Bhd had been facing a lot of customers' complaints arising from late reporting after survey jobs are completed coupled with poor staff performance, work ethics and lack of English language proficiency both written and spoken. The Appellant was appointed to redress the complaints.

b. Later, Mr. Sathiaseelan decided to change Sealand Marine Inspection (M) Sdn Bhd to Sealand Marine Inspection and Testing (M) Sdn Bhd because he intended to set up an independent laboratory to provide testing services. He gave 20,000 shares of the Company to the Appellant and made the Appellant as one of the shareholders for Sealand Marine Inspection and Testing (M) Sdn Bhd. The Appellant was not asked for any monetary consideration for the said shares.

c. Despite being an Operations Director and shareholder for the company, the Appellant avers that he was not involved with any of the Company's administration roles including signing cheques, signing board resolutions and the Appellant was not made signatory of the Company's cheques and banking documents.

d. The Appellant further avers that based on his position as an Operations Director, the Appellant carried out employee's duties by having present at the workplace every day and also did numerous site visits. The Appellant cited that since no Operations Manager was hired by the Company during his tenure, job allocations were closely monitored by him and drafts reports received from the surveyor (staff) after survey jobs are completed were thoroughly vetted and finalized by the Appellant before submission to the client.

e. Furthermore, the Appellant's pay slips attached in the Appellant's Statement of Case (C-1), reflects that there are deductions of EPF and SOCSO amounting to RM2,219.75. The Appellant's further avers that the payment of the salary was made on 26th every month into the Appellant's account. However, for the March 2018 salary, the Appellant only received his salary on 06/04/2018 after lodging a complaint to the Director General of Industrial Relations on 30/03/2018.

3. From the facts above, the Appellant was an employee and falls under the definition of workman of the Company and therefore this Honourable Court has a jurisdiction to hear this matter.

4. By referring to the case of *Phua Cheng Wai v. Katecs Asia Sdn Bhd* [2012] 4 ILR 657, *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687, *Chong Kim Sang v. Metatrade Sdn Bhd* [2004] 2 CLJ 439 and *Chin Chee Fui v. Wisma Rakyat Holdings Sdn Bhd* [2017] 2 LNS 0822, the Appellant was an employee and falls under the definition of workman of the Company and therefore this Honourable Court has a jurisdiction to hear this matter.

Workman – Preliminary Objection

[31] The company's case was that the appellant was paid a director fee of RM20,000 and did not fall within the definition of "workman" per s. 2 of the Act. Essentially, the company's case is that there was an understanding between Sathia (on behalf of the other directors) and the appellant that in consideration of the shares being allotted to the appellant without any payment for his shares, the appellant was to procure new clients for the company's business through his business network and connections.

[32] The other aspect of the so-called understanding is that the appellant would also become a director of the company who was to be responsible for the operations, sales and marketing of the company. Thus, as far as the company was concerned, the role of the appellant was as "Operations, Sales and Marketing Director". According to the company, it was further agreed that the appellant would be paid monthly director's fee of RM20,000 with contributions to EPF and SOCSO in his capacity as a director in performing these functions. The appellant was never given a letter of appointment nor a letter of termination of employment by the company.

[33] The company asserted that there was no contract of employment whatsoever between the appellant and the company. The company relied upon the decision of the Supreme Court in *Inchcape (M) Holdings Bhd v. RB Gray & Anor* [1985] 2 CLJ 305; [1985] CLJ (Rep) 132; [1985] 2 MLJ 297 ("*Inchcape*") and raised a preliminary objection before the Industrial Court. The thrust of the company's position was that the appellant was not a workman and he was a director and shareholder of the company and was in total control of the company.

[34] The issue in *Inchcape* was whether a company director can be a workman? The Supreme Court answered that question in the negative. The basis on which the Supreme Court arrived at the decision to exclude a company director from the ambit of the definition of workman for purposes of s. 2 of the Act can be seen from the judgment of George Seah SCJ where he said the following (at pp. 164 to 165 (CLJ); p. 318 (MLJ)):

> If a company director is to be regarded as representing the mind and will of the company and may not be treated as a servant of the company it would be strangely out of date (to borrow a phrase of Viscount Simon L.C. in *National Association of Local Government Officers v. Bolton Corporation* [1942] 2 All ER 425, 435) nowadays to urge the Industrial Court to

construe a company director, in the more complex conditions of modern companies, to include a "workman". Such a construction would place the company director in conflict with his duties and loyalty towards his employer and the company whom he represents. The proposition has only to be stated in order to make one realise how untenable it is. I am unable to accept it. In short, the simple test appears to be this: If a person or a company director can be regarded either expressly or by necessary implication, as representing the company in the course of the trading activities of the company, he ought not to be treated as a workman under the Act. Some support for this proposition may be found in *Bolton Engineering* case (*supra*) at page 630 where Denning LJ said:

> Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these directors and managers is the state of mind of the company and is treated by the law as such.

[35] Thus, in attempting to exclude the appellant from the ambit of the definition of "workman", the company endeavoured to portray the appellant as the "directing mind and will" of the company. But it should be noted that this was not specifically pleaded in the statement in reply. The appellant disavowed the company's assertion that he was in "control" of the company. He said he was in charge of day-to-day operations and that he was not even involved in the finances of the company. He said that Malarshobaa was the finance director and sole cheque signatory.

[36] The company sought to demolish the appellant's assertion/claim that he was a "workman" by referring to his police report, letter to the company (21 March 2018) and letter to the company secretary (10 April 2018) wherein the appellant had focussed on his termination/removal as "director" of the company. The company's argument in this regard was that (post 12 March 2018), the appellant's complaint at all times was in relation to his removal as director and not a complaint that he had been terminated/removed/dismissed as an employee (workman) of the company.

[37] According to the company, the appellant's claim that he was a workman who had been dismissed without just cause and excuse was as "afterthought" and contrived in order to seek remedies in the Industrial Court. The company took the position that if he was aggrieved by his removal as director, then he should pursue his remedies as provided for in the Companies Act 2016.

[38] The company took the position that the email dated 13 March 2018 to the marine survey community (Capt Cyril) which informed that the appellant had been "removal/terminated from Sealand Marine Inspection Testing effective from 12 March 2018. He does not represent the organisation anymore. Please remove him from your mailing list." was not to inform that the appellant had been dismissed as an employee but rather it was in reference to his removal as "director" of the company.

Cross-examination Of Appellant

[39] At any rate, the issue as to the appellant's conduct post 12 March 2018 was taken up during cross-examination and the appellant was confronted with the contents of his police report and the letters which he had written. The focus of the questions during cross-examination was to establish that the appellant had only complained about his removal or termination *qua* "director" of the company.

TJ OK. Now, Mr Krishnan, I take you to you police report.

Refer to your Bundle CLB, Yang Arif. Page 16 –

CHM 1-6?

TJ 1-6.

CHM 1-6

TJ 1-6 to, 16 to 17. Yang Arif. This police report is dated 13.03. 2018,

CHM Dated 13th March?

TJ 13th March.

CHM Yes.

TJ Ok. Now, please look at the, your occupation stated there. What is your occupation you put yourself as here?

Gopala Pengarah urusan.

TJ Pengarah urusan. Which means managing director.

Gopala Operations director.

TJ You described yourself as a director here.

Gopala That is the, as per my job scope.

TJ And, the, can you look at your report itself? Would you agree that your complaint was that the Company did not follow proper procedures in investigating the charges against you as a director? Refer you to page 17. The second last paragraph. The second last paragraph. I'm making this report for my own safety as a cover report because the directors have conspired against me and they have also made the arrangement with other employee staff to conspire with the director's motive to go against me. *This has led to a constructive dismissal and unlawful removal of me as a director not in the practice guideline and not recognised as statutory requirement of the Companies Act 2016.* So, you were referring to your position as a director here.

Gopala *Actually, employee first then as a director in the Company.*

TJ In your report did you mention here that you are an employee?

Gopala I think my report is already quite long. You cannot say -

TJ No. Is it stated there?

Gopala No, it's not stated there but -

TJ It's not stated.

Gopala It is stated in the first page, that is operation director

TJ No. Did you say anywhere here that the other directors conspired to remove me as an employee, as the operation manager?

Gopala I did not implicate anybody at this point of time.

TJ So, you agree you've never described yourself as an employee here? Yes or no?

Gopala Yes.

TJ Ok. Now, I refer you to your letter to the secretary at page 20 of the same bundle. Letters written by you to Sealand Marine Inspection and Testing and copied to the Company secretary. Now, I refer you to the heading of this letter regarding false eviction and constructive dismissal of a director. Do you agree, again you never mention that you were an employee in this letter?

Gopala Only a director can write to a Company secretary.

TJ No. No. I'm just asking you a simple question. Did you mention that you are an employee -

Gopala Yes. As a director in the, of the Company, in the Company register, I've written to the Company secretary.

TJ Yes. But you did not mention that you are an employee here.

Gopala I have mentioned, yes, as director.

TJ As a director?

Gopala Yes, because it's writing to the Company secretary.

TJ Because it's stated constructive dismissal of a director. It's very specific.

Gopala Both, yes. Both employee and that.

TJ Would you agree that all along at this juncture you will describe yourself as a director? No mention about you are being dismissed as an employee.

Gopala I'm writing to the Company secretary. So, I have to address as per the position in whatever documentation so that they can give me the information that I required.

TJ I put it to you, you are not telling the truth, Mr Krishnan. In fact, you lodged a complaint with the industrial relations is an afterthought because it contradicts your letters and the police report.

Gopala I disagree.

TJ Now, for the purposes of accounts of the Company, when you gained your monthly payments, do you agree that you were treated as a director?

Gopala If you can see the salary slip, it is clear I'm paying EPF and SOCSO as an employee.

TJ No. The accounts manager has testified that you were paid as a director and you were treated as a director even for tax purposes.

Gopala Position given is as the operations director, as an employee of the Company.

TJ As employee? Mr Krishnan, you keep saying you are an employee but where is the letter from the Company saying that you are an employee?

Gopala Mr Seelan or Sathia promised to give me the letter but he never gave. And, I've already moved on from the former Company based on utmost good faith.

TJ You move on from the former Company?

Gopala Yes. With utmost good faith. With what Mr Sathia promised me, I've already left my former Company and joined his Company as an employee. So, I have no room to go back to the former Company in current situation.

TJ But, there -

Gopala Since Mr -

TJ You still, you cannot produce any email or letter written to Mr Sathi and complain about this?

Gopala I have many times asked Mr Sathia for a letter because I know him as a friend and also as the executive director of the Company, he comes to office on and off and I've reminded him many times.

TJ I put it to you, you are not telling the truth, Mr Krishnan, because you are brought in as a director and the shareholder.

Gopala There was no offer as a shareholder. Only when Mr Sathia want to change the previous Company to undertake new initiatives for testing of petroleum products.

[40] The other aspect of the company's justification for the termination/removal of the appellant was the allegation that the appellant was guilty of misconduct. In this regard, the company relied on the complaints that were raised by some of the staff.

[41] According to the company, on 9 March 2018, the employees of the company *ie*, Mathanakumar (COW5), Prem Kumar (COW7), Veeveganathan (COW8), Parthiban (COW6) and Logeswary a/p Krishnan came to the office of Northwest at Bandar Baru Klang, where Ong and Sathia were directors, and tendered their resignations *via* letters dated 9 March 2018. They explained that their resignations were in respect of their complaints against the appellant. Ong and Sathia requested that they withhold their letters of resignation until further clarification/discussion. In their letters of resignation, the employees of the company complained about the behaviour of the appellant, quoting amongst others, "havoc on my mental and emotional health", "stress, pressure and mental torture" and "environment provided because of the pressure". The employees also informed the company of their intention to make a formal complaint against the company to the Department of Industrial Relations.

[42] Ong and Sathia subsequently convened a meeting of the said employees to give them the opportunity to clarify their complaints. The appellant attended this meeting which took place on 12 March 2018. The said employees complained that the appellant had at all times acted rudely and harshly towards them. They also said that they had witnessed a member of the staff (Farol) being assaulted by the appellant.

[43] Further, the appellant planned to get someone to assault Kalaiselvan, the finance executive of the company. The company contended that in response to these allegations, the appellant merely made a bare denial to each of these complaints.

[44] It was at this time that Sathia made the decision that the appellant ought to resign as a director and also for the operations and business of the company to cease, since the company had been suffering losses which were detrimental to the shareholders of the company. The company had been incurring losses since the date of incorporation until the meeting held on 12 March 2018. The company had been financed by funds from Northwest. The profit and loss statement for the period 1 November 2016 to 30 September 2018 showed that the company made a total net loss of RM1,098,604.59 during the relevant accounting period. Save for the appellant, the other directors concurred with Sathia's decision. The appellant refused to sign the letter of resignation as director of the company which was given to him and left the premises. The five employees were then transferred to Northwest.

Farol's Allegation

[45] One of the company's allegations of misconduct against the appellant were in relation to a complaint by one Farolrizwan bin Mohd Fuad ("Farol"). Farol testified as "COW3". Farol lodged a police report on 14 April 2018 wherein he claimed that the appellant had "roughed" him up.

[46] The incident is alleged to have taken place in November 2017, but Farol chose to lodge a report about five months after the alleged incident and after the appellant was no longer in the company. Farol's police report reads as follows:

> Tarikh : 14/04/2018
>
> Nama : Farolrizwan bin Mohd Fuad
>
> Pengadu Menyatakan:
>
> Pada bulan 11/2017 jam lebih kurang 0930 hrs semasa saya berada di pejabat beralamat Sealand Marine Inspection And Testing Malaysia Sdn Bhd. No 22A Tingkat 1 Jalan Tiara 2C KU1 Bandar Baru Klang 41500 Klang **saya dapati En Krishnan (Director of Operation).** Beliau telah melakukan gangguan dan mencetuskan masalah kecil serta menimbulkan ketidakpuas hati terhadap diri saya semasa saya menjalankan tugas di pejabat disebabkan hal kecil, ini En. Krishnan telah melakukan kekerasan seperti menaikan tangan nya dan menepis belakang kepala saya lalu menampar bahu saya dengan kuat hingga menyebabkan saya tidak selesa dan rasa diri terancam, En Krishnan juga mengaibkan maruah diri saya di hadapan rakan bekerja yang lain. Secara tidak langsung saya tidak mengambil tindakan untuk membalas balik atas perbuatan beliau terhadap diri saya dan saya terus keluar daripada pejabat dalam masa yang sama kejadian tersebut di saksikan oleh rakan-rakan sekerja yang lain. Saya datang ke balai polis buat laporan kerana tidak puas hati dengan tindakan En Krishnan terhadap saya dan saya juga mahu menafikan segala tuduhan sekira nya terdapat perkara yang berbangkit. saya juga telah kembali bekerja di syarikat tersebut dan buat laporan ini untuk keselamatan ke atas diri saya.
>
> Sekian laporan saya. (emphasis added)

[47] In the proceedings before the Industrial Court, the evidence given by Farol, was that he was physically assaulted by the appellant. Farol's answers to questions 14 and 15 of his witness statement are reproduced:

> 14 Sila jelaskan kepada Mahkamah, apa yang berlaku pada November 2017 yang melibatkan En. Gopala Krishnan dan anda?
>
> J: Pada bulan November 2017, semasa saya sedang menaip repot saya, diwaktu pagi, En. Gopala Krishnan melakukan gangguan dan mencetuskan masalah kecil serta menimbulkan ketidak puas hati terhadap saya. Tiba-tiba, En. Gopala Krishnan menaikkan tangan dan menepis belakang saya kepala saya lalu menampar bahu saya dengan kuat hingga menyebabkan diri saya tidak selesa dan rasa diri terancam.

[48] Farol testified that:

> 15. Adakah rakan-rakan sekerja anda berada di pejabat tersebut semasa kejadian tersebut berlaku?
>
> J: Kejadian tersebut di saksikan oleh rakan-rakan sekerja saya dan berada dalam keadaan terkejut dengan kelakuan En. Gopala Krishnan.

[49] He said the assault was corroborated by the evidence of other employees of the company *ie*, Mathanakumar, Parthiban, Prem Kumar, Veeveganathan.

Kalaiselvan's Allegation

[50] Another employee, Kalaiselvan said that he was fearful that the appellant would arrange for someone to beat him up. In his witness statement, Kalaiselvan said:

> 23 What happened on 7/3/2018?
>
> A: I was told by my colleague Prem Kumar, that Gopala Krishnan asked him whether he knows anyone that he can hire to beat me. I lodged a police report few days later on 9/3/2018.
>
> 36. This issue was also confirmed in the Witness Statement of Premkumar a/l Dhana Raj in his answer to question 13:
>
> 13 How long was this going on?
>
> A: Started around April 2017 until I resigned. He frequently asked me to stay back late. He once asked me if I know anyone to beat up my colleague, Kalai. He sometimes borrowed money from me, if I fail to give him, he will give me a hard time in the office.

The Industrial Court – Award

[51] The Industrial Court handed down the award wherein it ruled in favour of the appellant. The award is reported as *Gopala Krishnan Chettiar Muthu v. Sealand Marine Inspection And Testing (M) Sdn Bhd* [2019] 2 LNS 2245. In the award, the Industrial Court ruled:

(i) that the appellant was a "workman" per the definition in s. 2 of the Act, and

(ii) that the appellant had been dismissed without just cause or excuse; and

(iii) that the company be ordered to pay a sum of RM320,000 as back wages and compensation *in lieu* of reinstatement.

[52] The relevant parts of the award are reproduced herein and for consistency, all references in the award to the "claimant" have been modified to read as (appellant).

Industrial Court

Company's Preliminary Objections

20. The Company had in its Statement in Reply ("SIR") raised a preliminary objection whereby it contended that the minister had erred in referring the instant case to the Industrial Court under section 20(3) of the IRA in that the [Appellant] was never the employee of the Company as he is a Director and shareholder of the Company and therefore does not fall within the meaning of 'workman' under the Industrial Relations Act 1967 ("the IRA").

21. The central question that this Court needs to determine is whether the [Appellant] who holds the position as a Director and shareholder of the Company in his capacity as an Operation Director is also a workman/ employee of the Company?

Company's Contention

22. Essentially the Company's contention is that the [Appellant] is not an employee as he is a Director and shareholder of the Company and as such he does not fall within the meaning of 'workman' as defined under section 2 of IRA. In this regard the Company's reasons for contending as such are as follows:

(i) The [Appellant] was not issued with a Letter of Appointment as an employee.

(ii) The [Appellant] failed to produce a shred of documentary evidence of the existence of any contract of appointment.

(iii) The [Appellant] received monthly Director's fees of RM20,000.00 as evidenced by the Director's slip at pages 32 of COB and pages 1 - 3 of CLB.

23. Sathiaseelan (COW-2) had testified under cross, that the [Appellant] did not report to anyone and that he acted independently. The only control was on the finances of the Company, which was only natural since the money was coming from North West Marine, for the operations of the Company. Even on the issue of finances, the other directors acted on the advice and recommendation of the [Appellant], as they were not involved at all in the management and day to day decisions.

24. Ong Keng Hsing stated under cross-examination, that the [Appellant] was in charge of the operations of the Company, which involved the commercial as well as the day to day running of the Company. The commercial aspect involved servicing and bringing in new clients.

25. Kalaiselvan (COW4) was the Finance Executive of the Company, who handled the accounts. He testified at Q&A 6 of his Witness Statement COWS-4, that the [Appellant] was the main director who was in charge of the Company.

26. According to the accounting and administrative records of the Company, the [Appellant] was treated as a Director. The Company also made monthly deductions for income tax for the [Appellant] and he was treated in the tax records as a Director.

27. Kalaiselvan also testified at Q&A 24 of COWS-4, that he updated the [Appellant] with the monthly management report for the sales and expenses for the Company. This shows that the [Appellant] was involved in the management of the finances of the Company. The monthly accounts were supervised by him, according to the evidence of COW4, who was the Accounts Executive.

[Appellant's] Contention

28. The [Appellant's] contention essentially is that he being a Director and shareholder of the Company was also performing his duties as an employee of the Company. His reasons for stating so are as follows:

(i) The [Appellant] had submitted that a Director can be an employee/ workman at the same time (see Federal Court decision in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687 (Tab A) at page 713) where *inter alia* it stated that "that it is incorrect to state in absolute term as was done by Seah SCJ in *Inchcape* that a Company Director can never be a workman."

(ii) The Company's bear (*sic*) denial that the [Appellant] was not an employee cannot hold water as it is contradictory to the Company's evidence in that:

(a) [Appellant's] payslip at pages 2 and 3 of CLB used terms such as **basic pay which is known as salary** to the [Appellant]. Furthermore, the payslip at pages 1 - 3 of CLB stated that there were deductions towards the [Appellant's] EPF and SOCSO.

(b) From the evidence of Company's witnesses COW-1 Ong Keng Hsing during cross-examination stated that the [Appellant's] job scope was in charge of the operations of the Company consisting of commercial and day to day activities. COW-1 further agreed that even if the [Appellant] is not wearing the hat of the Director, he can still perform the job that was required of him by the Company. In other words, the job that was done by the [Appellant] can be done by an employee and not necessarily by a Director.

(c) COW-1 during cross-examination also stated that there were 5 Directors/shareholders, including the [Appellant] which the others became funders for the Company except the [Appellant], who was **alleged to have control** of the Company.

(d) However, during cross-examination of COW-2 Mr. Sathiaseelan gave contradictory evidence where he stated that he and Ong Keng Hsing were responsible for the sales and marketing for the Company. Furthermore, during cross-examination, COW-1 testified that SM Malarshobaa who is the Director of Finance for the Company was the sole signatory for the Company's account.

(e) COW-1 during cross-examination also testified that the [Appellant] has never once dealt with the Company's secretary and was not an authorised signatory for their Company's cheque books. Therefore, based on the evidence of COW-1 and COW-2, it is impossible for the [Appellant] to have a total control of the Company as there are another 4 Directors, who were involved with the management of the Company and also did not have a normal function of a corporate director.

(f) The testimony of COW-1 and COW-2 confirmed that there were no return letters, agreements or minutes of meetings presented during the trial to show that there were understandings between all the parties that the [Appellant's] task is to bring in new businesses and clients to the Company. Moreover, COW-2 had failed to produce any documentation during the trial to support his claim against the [Appellant] as to the onus of sales and marketing function of the Company for all Directors.

(g) COW-2 during cross-examination testified that the Company had been struck off from the Company's Registration, however the documents provided at pages 14 - 19 of COB were incomplete as no dates were made available to prove the legitimacy of the signatories on the documents.

(h) The [Appellant's] daily job in the Company can be inferred from COW-3 during cross-examination as he testified that the survey report prepared by him will be vetted by the [Appellant].

(i) Based on the above evidence none of it shows that the [Appellant] had neither exercised nor executed any Director's obligations for the Company. Furthermore, the [Appellant] even having shares in the Company, was not in fact involved and never took part in any of the Company's Board of Directors matters.

(j) The evidence of COW-1 and COW-3 further confirmed that the [Appellant's] job scope was in charge of the operation of the Company consisting of commercial and day to day operation *ie*, assigning surveyor for a site visit, vetting through report prepared by the surveyor, and entertaining clients of the Company which clearly shows that he was performing the work of an employee of the Company besides being a Director and shareholder of the Company.

Analysis and Conclusion

29. In the case of *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369, the Federal Court held at page 370 *inter alia* as follows:

(1) When ascertaining the meaning of the term 'workman', it is important to bear in mind the nature of the legislation in which it appears so that the construction given truly reflects the collective

will of Parliament. It is well settled that the Act is a piece of beneficent social legislation by which parliament intends the prevention and speedy resolution of disputes between employers and their workmen. In accordance with a well-settled cannons of construction, such legislation must receive a liberal and not a restricted interpretation. Thus, the expression 'workman' appearing in the Act should be liberally interpreted.

(2) As the word 'workman' is defined in the Act, it is not permissible to ascribe to it its common and ordinary meaning. The fact that the definition has been left unamended despite several amendments made to the Act, points to the conclusion that Parliament intended to keep the definition of 'workman' flexible, with a view of being worked out on a case by case basis.

(3) The flexible and correct approach to determine whether a claimant is a workman under the Act is to ascertain whether the contract of service or for services. A workman under the act is one who is engaged under a contract of service whereas an independent contractor engaged under a contract for services is not.

(4) Where it is necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a claimant is an important factor, although not the sole criterion. The terms of the contract between the parties must first be ascertained to determine the nature of the claimant's duties and functions. However, in a majority of cases, there are facts which show the nature, degree and extent of control, and these include the conduct of the parties at all relevant times.

(5) The true principle is that it is incorrect to state in absolute terms that a company director can never be a workman. An examination of the functions of the claimant is always necessary to decide the question ...

30. In the case of *Chong Kim Sang v. Metatrade Sdn. Bhd.* [2004] 2 CLJ 439, the Court of Appeal had unanimously decided that a director of a company can also be a workman as long as he was paid his monthly wages. The Court of Appeal had further held as such:

[3] It was not in dispute that the claimant received monthly wages/ salary under his contract of service/employment with the company, and that the company had also contributed to his Provident Fund all along. An employee of a company may well be appointed as a director of that company; nonetheless, he remains an employee of the company so long as his contract of service is not terminated and he continues to be paid his wages.

[4] It should have been clear to the learned chairman – from the terms of the claimant's contract of service with the company as well as from the company's board resolutions – that the claimant was a workman. He was still an employee of the company despite his appointment as the executive director of the company. That the

resolutions, been made a signatory respecting the company's cheques and banking documents and represented the company at public functions did not change the fact that he was an employee and a workman. The Industrial Court was wrong to have concluded that they did.

31. Further in the case of *Henry Eliathamby v. Tootpay Sdn. Bhd.* [2018] 4 ILR 22, it was held by the learned Chairman that by merely being a Director of a Company, it does not restrict the Director from also being an employee in this regards the relevant portion of the judgement is reproduce as follows:

[1] The fact that the claimant had been working for about five years had suggested that his role had not been a temporary one or one based on the needs of the Company for a short period of time. The fact that he had to report to the MD had suggested a degree of control that did not exist in a relationship where one was contracted for services. Based on all the evidence adduced, there had been an implied contract of service, despite the lack of the letter of appointment. Just because he had been a Director of the Company, it had not taken away his right to also be its employee and be entitled to his wages and statutory 14 contributions. There is no bar for an employee/workman to also be appointed as a Director of a Company.

32. Applying the above mentioned principles to the facts of the instant case, it is clear that the [Appellant] in the instant case while holding the position of Director and shareholder of the Company, he was at the same time performing the duties of an employee as an Operations Director. The Company's contention that the [Appellant] worked independently as he was the person in charge of the Company and that the other Director did not interfere in the business is unsustainable and misplaced. Besides what was stated earlier in the [Appellant's] submission, COW-4 Kalaiselvan during cross-examination gave evidence that the [Appellant] was not in charge for the expenses of the Company. COW-4 in fact testified during cross-examination that the Appellant also reported to a Finance Director, named SM Malarshobaa. As regards the [Appellant's] nature of work on a day to day basis the [Appellant] had stated in his evidence in chief at Q&A 9 of his Witness Statement CLWS that he had carried out employee's duties by having been present at the work place every day and also did numerous site visits. Since there was no Operations Manager hired by the Company during his tenure, job allocations were closely monitored by him and draft report received from the surveyor (staff) after the survey jobs had been completed were thoroughly vetted and finalised by him before submitting to the client.

33. The Company's contention that the [Appellant] was in charge of hiring staff was untrue as the [Appellant] never hired any staff during his employment in the Company. All staffs were old staffs from Sealand Marine except Prem Kumar a/l Dhana Raj COW-7 who was recommended by the [Appellant] to Mr. Sathiaseelan who accepted him.

34. Furthermore, the Company failed to produce any shred of documentary evidence to show that there was a Directors' meeting held to review the performance of the [Appellant] or that any instructions were given to the [Appellant] to bring in new businesses. The Company also failed to provide any form of documentation that indicated the sales and marketing which was done by each of the Directors.

35. Based on the above evidence, it is clear that even though the [Appellant] was holding the position as an Operations Director, he was not the main brain and controlling mind of the Company. If the [Appellant] was the brain and controlling mind of the Company, his access card would not be blocked, his personal belongings would not have been removed from the office and all staffs that lodged complaints against him may have been dismissed by the Company. In addition, based on the facts and evidences given during the trial, the [Appellant's] duties were subject to the directions given by the other Directors particularly Mr. Sathiaseelan and Mr. Ong Keng Hsing. Based on the above mentioned evidences in short, this Court has no hesitation in ruling that the duties and functions of the [Appellant] as shown above were clearly under the scope of a workman under section 2 of the IRA.

36. Now that the ruling has been made that the [Appellant] was an employee of the Company while being a Director and shareholder, it is now incumbent upon the Court to determine the next issue that is:

(i) Whether the [Appellant] was terminated/dismissed by the Company; and

(ii) If so, whether the [Appellant's] termination/dismissal were just with cause or excuse.

37. Let me now deal with these 2 issues.

(i) Whether the [Appellant] was terminated/dismissed by the Company?

38. The [Appellant] was actually terminated based on these facts:

(a) An e-mail was sent by Mr. Vijay on behalf of the Company dated 13.03.2018 (CLB page 15) which clearly stated as follows:

> This is to inform you that Mr. Krishnan has been removed/ terminated from Sealand Marine Inspection and Testing effective 12.03.2018. He does not represent the organization anymore. Pls remove him from your mailing list.

(b) The action of the Company by returning the [Appellant's] belongings on 14.03.2018 was not denied by the Company.

(c) The [Appellant's] access card and his Company's e-mail was blocked which was also not denied by the Company.

39. Based on the above 3 factors, this Court holds that the [Appellant] was dismissed from employment by the Company on 12.03.2018.

(iii) If so, whether the [Appellant's] termination/dismissal were just with cause or excuse?

40. The Company in its Statement in Reply at paragraph 14 had pleaded *inter alia* that the members of the staff namely S. Mathanakumar, Prem Kumar a/l Dhana Raj, Veeveganathan a/l Ramasamy, Parthiban a/l Jayapalan, Logeswary a/p Krishnan had complained that the [Appellant] had behaved in an abusive manner towards each of them, and created an unbearable pressure for them in the working environment, by compelling them to work late in the office regularly.

41. The Company had at paragraph 15 of this Statement in Reply had also pleaded as follows:

> All the above named employees had notified their intention to Ong Keng Hsing and Sathiaseelan, outlining the following reasons:
>
> i. S. Mathanakumar (COW-5) – work pressure from the [Appellant] causing mental stress;
>
> ii. Prem Kumar a/l Dhana Raj (COW-7) – stress, pressure and mental torture given by the [Appellant]. Prem Kumar also informed that the Appellant had critics the 'weak' performance of the 2 other directors, Ong Keng Hsing and Sathiaseelan. Prem Kumar and other staff also complained that the [Appellant] raised his voice and threaten to break the glass cubicle if Prem made him angry;
>
> iii. Veeveganathan a/l Ramasamy (COW-8) – stress, pressure and mental torture given by the [Appellant];
>
> iv. Partiban a/l Jayapalan (COW-6) – pressure, stress and mental torture given by the [Appellant];
>
> v. Logeswary a/p Krishnan – work pressure, stress and mental torture given by the [Appellant]. She also complained she had suffered a miscarriage as a result of work pressure by the [Appellant];
>
> vi. The [Appellant] abused Farolrizwan bin Mohd Fuad (COW-3) in November 2017 and behaved violently and aggressively by raising his hand and pushing the back of Farolrizwan's head and hitting his shoulder violently causing him to feel threatened for his safety and leaving the office. A police report was later lodged (See exhibit CO-6);
>
> vii. Kalaiselvan a/l Shummugam (COW-4), the Finance Executive of the Company, complained that on 07.03.2018, he was informed by Prem Kumar a/l Dhana Raj that the [Appellant] had asked Prem Kumar a/l Dhana Raj, to look for someone to beat him, purportedly for office disagreements. A police report was lodge by Kalaiselvan (See Exhibit CO-7).

42. The [Appellant's] Counsel in cross-examination had challenged the wild complaints of the Company's witnesses lodged by COW-3, COW-4, COW-5, COW-6, COW-7 and COW-8 respectively against the [Appellant] as they were unsubstantiated allegations devoid of any credible evidence as there were no medical reports to support their allegations such as constant stress, tension and depression.

43. The Company's witnesses' claims were also baseless as their allegations about extreme work pressure against the [Appellant] were untrue as the evidence shows that the [Appellant] was merely correcting their mistakes and it was done on the basis of professional ethics and not personal.

44. COW-5 Mathanakumar during cross-examination could not provide the meaning of 'Amalgamation' and 'wreaked havoc' used in his resignation letter.

45. COW-6 Parthiban during cross-examination agreed that working after office hours/public holidays and weekend is mainly to complete the pending reports which urgently need to be completed and sent to the client.

46. A police report (COB at pages 10 - 12) lodged by COW-3 on 14.04.2018 against the [Appellant] allegedly hitting COW-3 was make 5 months after the incident happened. The truthfulness of this police report is therefore questionable and without merit.

47. It is the considered view of this Court that based on the above mentioned evidence of the Company's witnesses from COW-3 until COW-8 respectively, the said witnesses had failed to prove the [Appellant's] misconduct. In the Court's view, the meeting that was held on 12.03.2018 was just for them to throw wild accusations against the [Appellant]. COW-1 further confirmed that there was no show cause notice issued to the [Appellant] about the alleged misconduct by the [Appellant].

There was no proper Domestic Inquiry made against the [Appellant] with regard to all accusations made by COW-3 until COW-8 on 12.03.2018. It is the considered view of this Court that after having evaluated all the evidences given by COW-3 until COW-8, they appear to have stated along the same version and therefore it is not inherently supported by any credible evidence. There was no solid evidence against the [Appellant] with regard to the complaints (*ie*, harsh treatment and extremely long working hours) made against the [Appellant]. The upshot of it all is that the Company failed to discharge the burden of proving that the [Appellant's] dismissal is with just cause or excuse.

Conclusion

48. Based on the above facts and analysis and applying section 30(5) of the IRA 1967, the Court has acted with equity, good conscience and the substantial merits of the case without regard to technicalities and legal form and in doing so, it has no hesitation in holding the view that the [Appellant's] dismissal was without just cause or excuse. Let me now deal with the issue of remedy to be granted to the Appellant.

Remedy

49. The Court is of the view that reinstatement of the [Appellant] is not an appropriate remedy in the circumstances of the case as the relationship between the Company and the [Appellant] has deteriorated to a

significantly unbearable level. It must be borne in mind that the [Appellant] on the facts of this case was not given any Appointment Letter. However, the [Appellant] had joined the Company as a shareholder and an Operations Director tasked with the handling of the operations of the Company as an employee of the Company besides being a Director and shareholder. Furthermore, the [Appellant's] appointment as an Operations Director is neither a fix term contract and neither had he to undergo a probationary period since there was no Appointment Letter with terms specified.

50. In the circumstances, the Court has no hesitation in ruling that the Appellant's engagement as an Operations Director while being a Director and shareholder is deemed to be a permanent employee.

51. Therefore as an employee and Director and shareholder, he had worked for a period of 1 year and 3 months that is from 12.12.2016 until 12.03.2018 which is less than 24 months. In the circumstances of the case, it is with equity and good conscious that he be granted a 'global sum' of 15 months' compensation equivalent to the period of months he had worked plus an additional one-month salary of compensation *in lieu* of reinstatement as he had completed one-year service.

52. At the hearing, no evidence was led as to the [Appellant's] post dismissal earnings. Hence, the Court will not make any deduction for post dismissal earnings.

53. The Court will also not make any deduction for any contributory misconduct on the [Appellant's] part as there was no evidence to that effect at the hearing.

54. After considering the above, the Court orders that the relief on a 'global sum' compensation to be awarded to the [Appellant] shall be as follows:

i. RM20,000.00 salary per month x 15 months = RM300,000.00

ii. One-month salary as compensation *in lieu* of reinstatement = RM20,000.00

Total global sum compensation = RM320,000.00

Order

55. It is hereby ordered that the sum of RM320,000.00 (Ringgit Malaysia Three Hundred and Twenty Thousand Only) after deducting the necessary statutory deductions if any, is to be paid to be paid by the Company to the [Appellant's] Solicitors; Messrs Gulam & Wong within 30 days from the date of this Award.

Handed down and dated This 08th day of August 2019

(emphasis added)

A **Judicial Review – Order 53 Statement**

[53] The company applied to the High Court under O. 53 of the Rules of Court 2012 for judicial review to have the award quashed *via* an order of *certiorari*. Broadly, the question in the judicial review was whether the Industrial Court had committed an error of law in making a finding that the
B appellant was a "workman" per the definition in s. 2 of the Act. And if the appellant is a workman, then the next question is whether he had been dismissed without just cause or excuse and thereby entitled to reliefs per s. 20 of the Act. The High Court agreed with the company and concluded that the Industrial Court had committed an error of law in holding that the
C appellant was a workman. The High Court opined that the appellant was not a "workman" and quashed the award.

[54] The company relied upon the following grounds per the statement pursuant to O. 53 r. 3(2) of the Rules of Court 2012 ("O. 53 statement") which read as follows:
D

(i) the Industrial Court took irrelevant matters into consideration;

(ii) the Industrial Court failed to take relevant matters into consideration;

(iii) the Industrial Court arrived at conclusions without taking into consideration and/or taking heed of the relevant documents and
E evidence which were tendered at the hearing;

(iv) the Industrial Court misconstrued or failed to consider the applicable law in the circumstances of the case;

(v) the Industrial Court arrived at a decision which was perverse and
F unjustified, such that no reasonable tribunal, similarly circumstanced, could have arrived at such a decision; and

(vi) the Industrial Court had exceeded and/or acted without jurisdiction in arriving at its conclusion and the award.

G **[55]** Clearly, there was no specific or particularised ground in the O. 53 statement. The O. 53 statement merely stated general and generic grounds without identifying with particularity the manner in which the Industrial Court had allegedly committed error(s) of law which vitiated the award. Be that as it may, we may now examine the High Court's grounds of judgment.

H **High Court – Grounds Of Judgment**

[56] The High Court ruled that the appellant was not a workman and that in relation to the appellant's misconduct, the award suffered from "*Wednesbury* unreasonableness". The High Court's reasons for allowing judicial review and granting *certiorari* to quash the award may be gathered
I from the grounds of judgment which reads as follows:

Sama ada terdapat kesilapan undang-undang, tidak rasional dan munasabah di dalam Awad Responden Pertama.

[14] Terdapat 3 isu utama dikemukakan kepada Mahkamah Perusahaan iaitu:

i. Sama ada Responden Kedua adalah seorang "Pekerja" yang pada masa yang sama merupakan pengarah dan pemegang saham syarikat Pemohon;

ii. Sekiranya terbukti Responden Kedua adalah seorang Pekerja, sama ada beliau telah dipecat secara salah; dan

iii. Sama ada sebagai pengarah dan pemegang saham, Responden Kedua tidak boleh memohon perintah "reinstatement" di Mahkamah Perusahaan;

[15] Responden Pertama di dalam perenggan 35 Awadnya telah memutuskan bahawa Responden Pertama adalah seorang "Pekerja" menurut Seksyen 2 Akta Perhubungan Perusahaan 1967. Alasan Responden Pertama memutuskan demikian bahawa Responden Pertama tidak mempunyai kuasa kawalan ke atas syarikat Pemohon. Mahkamah merujuk perenggan 35 Awad yang menyatakan:

> [35] Based on the above evidence, it is clear that even though the Appellant was holding the position as an Operation Director, he was not the main brain and controlling mind of the Company ...

[16] Responden Pertama juga memutuskan bahawa Pemohon telah gagal membuktikan bahawa pemecatan Responden Kedua adalah adil dan dengan sebab yang baik.

[17] Adalah fakta yang tidak dipertikaikan bahawa Responden Kedua merupakan salah seorang pengarah syarikat dan juga pemegang saham syarikat sebanyak 20,000 unit syer. Laporan Suruhanjaya Syarikat Malaysia (Ekshibit "SV-2", muka surat 82 hingga 85, Afidavit Sokongan Pemohon) membuktikan kedudukan Responden Kedua di dalam syarikat Pemohon.

[18] Responden Kedua dibayar elaun pengarah sebanyak RM20,000.00 sebulan dengan sumbangan KWSP dan SOCSO sebagai pengarah syarikat. Bayaran elaun Responden Kedua ditunjukkan di dalam "Director Slip" dengan catatan "Director Fee" dan tiada catatan untuk "Staff No" (Ekshibit "SV-2", Afidavit Sokongan Pemohon) berbanding dengan pekerja-pekerja Pemohon yang lain sebagaimana di muka surat 96 dan 97 ekshibit "SV-2" iaitu "Salary Slip", "Basic Pay" dan "Staff No. SMI 070" dan "Staff No. SMI 050". Pengarah-pengarah syarikat yang lain iaitu COW1 (Ong Keng Hsing) dan COW2 (Sathiaseelan a/l T. Vijiyanthran) juga dibayar "Director Fee" dan juga menyumbang KWSP dan EPF.

[19] Pemohon juga mengesahkan bahawa Responden Kedua tidak pernah dilantik oleh syarikat sebagai pekerja syarikat. Fakta ini juga disahkan sendiri oleh Responden Kedua. Keterangan saksi Pemohon iaitu COW1 dan COW2 sebagal pengarah dan pemegang saham syarikat mengesahkan

segala operasi dan pentadbiran syarikat dikendali sepenuhnya oleh Responden Kedua. COW-1 dan COW-2 percaya Responden Kedua boleh melaksanakan operasi syarikat tanpa bantuan mereka. Semua keputusan mengenai operasi syarikat dibuat oleh Responden Kedua. Responden Kedua juga mempunyai kawalan ke atas pekerja-pekerjanya.

[20] Seksyen 2, Akta Perhubungan Perusahaan 1967 (Akta tersebut) mentakrifkan maksud pekerja seperti berikut:

> "workman" means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

Keterangan COW-1 dan COW-2 menyokong keterangan Pemohon bahawa Responden Kedua bukanlah pekerja yang dimaksudkan di bawah Seksyen 2 Akta sebagaimana yang diputuskan oleh Responden Pertama.

[21] Mahkamah juga merujuk keputusan Mahkamah Persekutuan di dalam kes *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687, yang memutuskan seperti berikut:

[22] Terdapat fakta-fakta di hadapan Responden Pertama menunjukkan Responden Kedua bukanlah seorang pekerja menurut Seksyen 2 Akta. Mahkamah merujuk kepada surat Responden Kedua kepada Pemohon bertarikh 21/3/2018, kepada Setiausaha Syarikat bertarikh 10/4/2018 dan laporan polis Responden Kedua bertarikh 13/3/2018 yang secara jelasnya tidak menyatakan Responden Kedua adalah pekerja kepada syarikat Pemohon. Kesemua dokumen dokumen tersebut menyebut Responden Kedua sebagai Pengarah dan Pemegang Saham Syarikat.

[23] Fakta nyata ini boleh dilihat di dalam surat Responden Kedua sendiri kepada Pemohon bertarikh 21/3/2018 di perenggan 3 dan 7 menyatakan:

> For record purposes, I as named above was appointed as a member of the Board of Directors of the Company and also a shareholder of the Company. [perenggan 3].
>
> I seek the Company's board of directors' formal explanation on my status as a director and as a shareholder of the Company, with an official explanation in writing by the Board of Directors of the Company. Failing to respond to me within 3 working days, I am left with no option but to bring this matter to the Registrar of Companies, Malaysia and to proceed with legal action, against the Board of Directors of the Company. [perenggan 7]

[24] Dapatan Responden Pertama bahawa "even though the Appellant was holding the position as an Operation Director, he was not the main brain and controlling mind of the Company ..." adalah suatu salah tafsiran

undang-undang mengenai kawalan ke atas aktiviti syarikat Pemohon. Responden Pertama gagal mengambil pertimbangan faktor relevan bahawa Responden Kedua sebagai pemegang saham kedua terbesar dalam syarikat Pemohon tidak membayar sebarang nilai saham yang diperolehinya. Sebagai ganti pembayaran saham yang diperolehinya, Responden Kedua seharusnya membawa pelanggan-pelanggan baru untuk perniagaan Pemohon dari rangkaian perniagaan dan kenalannya dan juga akan menjadi pengarah Pemohon yang bertanggungjawab khususnya terhadap operasi dan pemasaran keseluruhan syarikat Pemohon. Berikut darinya Responden Kedua dijadikan pengarah operasi, jualan dan pemasaran. Responden Kedua tidak pada bila-bila masa menafikan kedudukan beliau sepertimana yang dipersetujui dalam syarikat Pemohon.

[25] Responden Pertama gagal mengambil kira faktor relevan bahawa syarikat Pemohon diwakili oleh 5 Ahli Lembaga Pengarah termasuk Responden Kedua. Komponen Ahli Lembaga Pengarah Pemohon tersebut yang mengurus dan mengendali perjalanan aktiviti perniagaan syarikat Pemohon. Syarikat Pemohon berada dalam kawalan penuh oleh Lembaga Pengarahnya. Ini selaras dengan peruntukan Seksyen 211 Akta Syarikat 2016 yang menyatakan perniagaan dan hal ehwal sesuatu syarikat hendaklah diuruskan oleh atau di bawah arahan Lembaga Lembaga Pengarah mempunyai segala kuasa yang perlu bagi mengurus dan memberikan arahan serta mengawasi pengurusan perniagaan dan hal ehwal syarikat tertakluk kepada apa-apa ubah suaian, kecualian atau batasan yang terkandung dalam Akta Syarikat atau dalam perlembagaan syarikat.

Function of Board

211. (1) The business and affairs of a company shall be managed by, or under the direction of the board.

(2) The Board has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in this Act or in the constitution of the company.

[26] Berdasarkan peruntukan Seksyen 211 Akta Syarikat tersebut, Responden Pertama silap di sisi undang-undang apabila memutuskan bahawa Responden Kedua bukanlah orang yang bertanggungjawab mengurus dan mengawal syarikat Pemohon.

[27] Mengenai sumbangan Responden Kedua kepada Kumpulan Wang Simpanan Pekerja, peruntukan Seksyen 43(8)(d) Akta Kumpulan Wang Simpanan Pekerja 1991 (Akta KWSP) telah memperuntukkan bahawa seseorang yang bukan pekerja atau majikan boleh menyumbang menurut Akta KWSP dengan persetujuan masing masing. Perkara yang sama dilakukan oleh Responden Kedua dan juga pengarah-pengarah lain di dalam syarikat Pemohon.

Sama ada Responden Kedua telah dipecat dan/atau ditamatkan oleh syarikat Pemohon?

[28] Responden Pertama di perenggan 38 Awadnya telah membuat dapatan bahawa perkhidmatan Responden Kedua telah ditamatkan dengan merujuk kepada emel syarikat bertarikh 13/3/2018 yang dihantar oleh Encik Vijay bagi pihak syarikat, tindakan memulangkan barang-barang peribadi milik Responden Kedua dan kad akses ke pejabat dan emel syarikat ditahan atau diberhentikan oleh Pemohon.

[29] Mahkamah merujuk kepada emel bertarikh 13/3/2018 (ekshibit "SV-2", muka surat 145, Afidavit Sokongan Pemohon) yang menyatakan seperti berikut:

> Dear Capt Cyril,
>
> This is to inform you that Mr. Krishnan has been removed/ terminated from Sealand Marine Inspection and Testing effective 12 March, 2018. He does not represent the organization anymore. Pls remove him from your mailing list.
>
> Thanks.
>
> Rgds/MVijay.

Berdasarkan kepada latar belakang fakta kes ini, adalah pendapat Mahkamah inl, Responden Kedua telah dikeluarkan dan ditamatkan sebagai pengarah syarikat dan pengarah operasi. Mahkamah ini bersetuju dengan hujahan pihak Pemohon bahawa emel Pemohon tidak menyalakan Responden Kedua ditamatkan perkhidmatannya.

[30] Berdasarkan kepada perkataan "has been removed/terminated" tersebut, maka Responden Kedua melalui suratnya kepada Pemohon bertarikh 21/3/2018 dengan pengetahuannya menyatakan pendiriannya mengenai pelanggaran Akta Syarikat 2016 oleh Lembaga Pengarah syarikat Pemohon. Perenggan 6 surat menyatakan seperti berikut:

> I would like to bring to the Company's board of directors attention on the above informal discussion and decision undertaken by the Company on 12 March, 2018; and subsequent effect has violated the principal and statutory provisions of the Companies Act 2016 and has breached the precedent Company law pertaining to the statutory standing of a director.

Tajuk surat bertarikh 21/3/2018 adalah mengenal "RE: FORCED EVICTION AND CONSTRUCTIVE DISMISSAL OF A DIRECTOR" dan bukan penamatan perkhidmatan.

[31] Surat Responden Kedua kepada Setiausaha Syarikat bertarikh 10/4/2018 juga berkaitan dengan kedudukan beliau sebagai pengarah syarikat dan Mesyuarat Lembaga Pengarah dan Minit Mesyuarat Lembaga Pengarah daripada Setiausaha Syarikat. Surat Responden Kedua dirujuk iaitu:

Re: Sealand Marine Inspection And Testing (M) Sdn Bhd. (1207748-U)

1. Closure of Business Operation; and
2. Denial of Access to the Office, by the Board of Directors of the Company; and
3. Citing the Company's Resolution and Register Books.

Reference is made to the above matter.

I, Gopala Krishnan Chettiar a/l Muthu as addressed above was appointed as Director and registered as a Member of Sealand Marine Inspection And Testing (M) Sdn Bhd (1207748-U) ("the Company").

I would like to seek clarification and your guidance as the appointed Company Secretary of the above mentioned Company, for the following mentioned matters below:

1. Enclosed herewith is a Notice dated 23 March, 2018 from the Board of Directors of the Company pertaining to the closure of business operation. Please clarify was there any Board of Directors Meeting called for the above. If so, was there a Notice calling for the Board of Directors Meeting circulated to all the Directors. Alternatively, was there a Circular resolution circulated to all the Directors to approve the closure of business operation as stated in the Notice as circulated by the Directors, as mentioned above.

   If yes, *I would like to cite the original of the Notice of the Board of Directors Meeting or Circulation Resolution, and to be provided with the copies of the said documents which were approved by the Board of Directors.*

[32] Adalah pendapat Mahkamah ini, kandungan surat Responden Kedua kepada Pemohon dan Setiausaha Syarikat jelas menunjukkan ketidakpuasan Responden Kedua adalah mengenai penyingkiran (removal) sebagai pengarah syarikat dan ketidakpatuhan Pemohon kepada peruntukan Akta Syarikat 2016. Malah Responden Kedua di dalam surat yang sama menegaskan pendiriannya kepada Setiausaha Syarikat untuk melaksanakan haknya di bawah Akta Syarikat 2016. Sekali lagi, Responden Kedua gagal menghargai fakta aduan Responden Kedua sebenamya berkaitan dengan Akta Syarikat 2016 dan bukan di bawah Akta Perhubungan Perusahaan 1967.

[33] Responden Pertama di dalam mencapai Awadnya gagal mengambil kira keterangan COW-1, COW-2 dan saksi-saksi Pemohon yang lain bahawa Responden Kedua:

a. Merupakan rakan kongsi perniagaan dan pemegang saham syarikat Pemohon.
b. Pengarah syarikat yang bertanggungjawab terhadap operasi, jualan dan pemasaran syarikat.

A

c. Menekan dan mengugut pekerja syarikat di bawah kawalan Responden Kedua sehingga mengakibatkan pekerja bernama S. Mathanakumar (COW-5). Prem Kumar (COW-7), Veeveganathan a/l Ramasamy (COW-8), Parthiban Jayapalan (COW-6) dan Logeswary Krishnan meletak jawatan masing masing dari terus bekerja di bawah Responden Kedua (ekshibit "SV-2" muka surat 98-102, Afidavit Sokongan Pemohon).

B

d. Pemotongan nama syarikat daripada Suruhanjaya Syarikat Malaysia (SSM) kerana gagal menghasilkan keuntungan setelah 15 bulan syarikat ditubuhkan (ekshibit "SV-2", muka surat 78, Afidavit Sokongan Pemohon).

C

[34] Berdasarkan kepada fakta kes ini, Mahkamah ini mendapati Responden Pertama dalam mencapai keputusannya telah khilaf di sisi undang-undang di dalam tafsiran pekerja dan kontrak untuk perkhidmatan terhadap Responden Kedua dan mengambil kira faktor-faktor tidak relevan daripada mengambil kira faktor-faktor relevan yang mengakibatkan keputusan yang dicapai adalah tidak munasabah sehinggakan tiada orang atau tribunal yang munasabah dalam keadaan sedemikian boleh mencapainya. Keputusan Responden Pertama disifatkan sebagai "*Wednesbury* unreasonableness" sebagaimana yang diputuskan oleh Mahkamah Persekutuan di dalam kes *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 1 MLJ 417 seperti berikut: ...

D

E

[35] Kesimpulan

Setelah Mahkamah menimbang permohonan Pemohon dan hujahan pihak-pihak, Mahkamah ini mendapati Awad Responden Pertama mempunyai kesilapan undang-undang dan tidak munasabah dan tidak rasional dan wajar disemak oleh Mahkamah ini. Mahkamah dengan ini membenarkan permohonan Pemohon untuk semakan kehakiman dan membatalkan Awad Responden Pertama bertarikh 8.8.2019 dengan kos sebanyak RM5,000.00 di bayar oleh Responden Kedua kepada Pemohon tertakluk bayaran Fi Alokatur.

(emphasis added)

F

G

Our Decision

[57] We shall start by referring to the case of *Assunta Hospital v. Dr A Dutt* [1980] 1 LNS 121; [1981] 1 MLJ 115 ("*Dr Dutt*"), where the Federal Court dismissed the employer's application for a prohibition to prevent the Industrial Court from adjudicating the matter on the ground that Dr Dutt was not a workman. The Federal Court observed at p. 116 (MLJ) as follows:

H

I

The question whether Dr Dutt was a workman within the definition in the Act so as to avail himself of the provisions thereof, in our view and with respect, **is a mixed question of fact and law and clearly within the province of the Chairman to find in a reference to him of the workman's representations of dismissal without just cause or excuse.**

(emphasis added)

[58] We turn now to the *Inchcape* case. It is acknowledged that industrial jurisprudence has completely moved away from the Supreme Court's decision in *Inchcape* which had posited in absolute terms that a director cannot be a workman as defined in s. 2 of the Act. It has now been firmly established by the Federal Court that the mere fact that a person is a company director does not preclude that person from also being a workman for purposes of s. 2 of the Act.

[59] The legal position in this regard was clearly stated by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687, [1995] 3 MLJ 368 ("*Hoh Kiang Ngan*") and the Court of Appeal decision in *Chong Kim Sang v. Metatrade Sdn Bhd* [2004] 2 CLJ 439, [2004] 3 MLJ 1, [2004] 3 AMR 383 ("*Metatrade*").

[60] In particular, the Federal Court in *Hoh Kiang Ngan* held that the central issue to the question whether a claimant is a "workman" was the nature, degree and extent of control of the duties and functions which are not limited to the terms of a written contract but included the conduct of the parties at all relevant times. These would determine whether a person is employed under a contract of service (employee/workman) or under a contract for services (independent contractor). Hence, a workman under the Act, was one engaged pursuant to a contract of service whereas an independent contractor was one engaged under a contract for services.

[61] In *Hoh Kiang Ngan*, the Federal Court enunciated that the definition of "workman" is a flexible one and that since the Act is a manifestation of social legislation, the term workman should be construed "liberally" and not "restrictively". This is how the Federal Court put it:

> [1] The interpretation of the term "workman" appearing in s. 2 of the Act requires an independent exercise, having regard to the nature and language of the Act, and the content, purpose, and policy of its enactment. This is necessary to ensure that the construction of the term truly reflects the collective will of Parliament and does not produce a result not intended by it.
>
> [2] *The Act is a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen.* In accordance with well-settled canons of construction, *such legislation must receive a liberal interpretation.* The definition of the term "workman" is flexible, and is to be worked out on a case by case basis.
>
> [3] The definition of "workman" applies to all contracts of service but not to independent contractors who are engaged under contracts for services. In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a claimant is an important factor but may not be the sole criterion. It is a question of fact. The capacity in which one is employed or the purpose of the employment

does not answer the question of the definition of a "workman". *It is the function of and the duty actually discharged by the particular claimant that is important and not merely the label that is attached to the particular employment or indeed the purpose of the engagement.*

[4] A finding by the Industrial Court that a claimant is or is not a workman within the Act is not conclusive and is subject to judicial review upon a motion for one or more of the prerogative orders. However, an application for the prerogative order of prohibition is not an appeal and neither the High Court nor the instant Court is entitled to review the merits of the decision. Although the powers are purely discretionary and although no limits can be placed upon that discretion, it will only be exercised if substantial injustice has ensued or is likely to ensue. The Courts will not set right mere errors of law that do not occasion injustice in a broad and general sense. (emphasis added)

[62] The Federal Court unequivocally repudiated the approach that was taken by the Supreme Court in *Inchcape* on the question as to whether a "director" can also be a workman.

[63] According to the Federal Court, the proper approach is to apply the test that was enunciated by the Federal Court in *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5; [1981] 1 MLJ 304 at 311 – the question as to whether a person is a workman is a "mixed question of law and fact" and that in dealing with the question as to whether a person is a workman, or independent contractor, various factors and features of the engagement will have to be considered in deciding one way or the other. The Federal Court's opinion in *Hoh Kiang Ngan* per the following passage from the judgment is instructive:

> In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a Appellant is an important factor, although it may not be the sole criterion. The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined to, the conduct of the parties at all relevant times. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services.

[64] Later, in the case of *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777; [1997] 2 MLJ 685, the Federal Court went on to state that *Inchcape* which posited in absolute terms that a director is not a workman was "wrongly decided", and is "no longer good law". The Federal Court

repudiated the principle that was established in *Inchcape* and went on to state the Supreme Court fell into error stating in absolute terms that a company director can never be a workman.

[65] In the present appeal, the company raised the preliminary issue that the appellant was not a "workman" as defined under the Act. Citing the definition of "workman" under the Act that had been discussed in the Federal Court's case of *Inchcape*, the company contended that as a director, the appellant was in "total control" and the very brain of the company or was the company's directing mind and was responsible for determining and formulating the company's policy. Therefore, the appellant could not be regarded as a "workman".

[66] Applying the principles that were established by the Federal Court in *Hoh Kiang Ngan*, we are convinced that the Industrial Court, which examined the functions of the appellant, was correct to find that although the appellant was a director/shareholder, he was nevertheless carrying out function or duties as a workman in his capacity as "operations director". And, there is no evidence that he was removed as a director of the company. But it is nevertheless undisputed that the appellant was in fact removed/terminated – which can only mean that he was removed/terminated as an operations director *ie*, as a workman. There is no evidence that the appellant was an independent contractor.

[67] As for the company's reliance on the appellant's police report and letters written to the company (post 12 March 2018), we take the view, following the *ratio decidendi* of the Federal Court's decision in *Maritime Intelligence Sdn Bhd v. Tan Ah Gek* [2021] 10 CLJ 663; [2022] 1 MLRA 56; [2022] 1 MELR 200; [2021] 8 AMR 809; [2021] AMEJ 1763, that the subsequent conduct of the appellant per his police report dated 13 March 2018, his letter to the company dated 21 March 2018 and his letter to the company secretary dated 10 April 2018, are irrelevant to the issue as to whether he was a "workman" per s. 2 of the Act. Put in another way, it is our view that even if the appellant had demanded a response on his position as "director", it did not *ipso facto* result in him abandoning or waiving his rights per his status as an employee.

[68] In any event, the appellant did say in his answer during cross-examination that besides being a director of the company, he was also an employee. It is trite that the question as to whether the appellant was a workman or not, is a mixed question of law and fact for the Industrial Court to decide (per *Dr Dutt*). The High Court ought not to have readily interfered with the Industrial Court's finding that the appellant was a "workman". In our view, the Industrial Court's finding was not irrational or perverse. The Industrial Court correctly identified the relevant legal principles and applied to a set of factual finding with regard to the nature and content of the appellant's function and duties as operations director of the company.

[69] Next, as far as the issue of alleged misconduct is concerned, that again is a matter for the Industrial Court to decide. The Industrial Court gave its reasons for rejecting the complaints that were made by the several witnesses who testified on behalf of the company. We are of the view that the High Court had misdirected itself in reversing the Industrial Court's findings of fact on these two critical issues. As such, appellate interference is warranted.

[70] In our view, the Industrial Court had carefully considered all the evidence that was presented and concluded that the appellant had been dismissed without just cause or excuse. Clearly, the appellant was not given the "heads-up" on matters that were said to be brewing and was literally "ambushed" and cornered into a situation where he was confronted with a barrage of allegations and asked to tender his resignation. But he refused.

[71] In our view, rightly so. Even if the appellant had signed on the resignation letter which the company had prepared for him, it will not preclude him from prosecuting a claim based on constructive dismissal as the resignation letter would have been regarded as a document which was procured under oppressive circumstances.

[72] It is obvious that Sathia and Ong had decided that the appellant should leave the company and this is proven by the fact that they had asked the appellant to join the meeting whilst having in their hand a resignation letter for the appellant to sign. If he was being asked to resign, then it is relevant to ask, resign as what?

[73] It is also relevant to ask – if the appellant was, as the company contends, in "total control" and the "directing mind and will", how is it that although he holds 20,000 shares, the others could try and compel the appellant to sign on a pre-prepared resignation letter and could effectively drive him off the company's premises?

[74] The company went a step further and announced to the marine survey community that the appellant had been "terminated/removed". It is obvious enough that the company was determined to announce to all the relevant stakeholders that the appellant had "fallen from grace". From the circumstances, it is apparent that he was being asked to leave his position as director of operations. There is no position in the board of directors as "director of operations". It is quite obvious from the evidence that was presented to the Industrial Court that the appellant, although a shareholder and director, was in reality, an employee carrying out executive functions as director of operations.

[75] It was in those circumstance that the Industrial Court opined that the appellant was not the directing mind and will of the company and was in reality and in substance, an employee ("workman") who was paid a "basic pay" of RM20,000.

[76] The fact that the director slip did not indicate any staff number for the appellant does not detract from the undeniable fact that he was running the operations of the company but his job scope was limited. He was not in charge of finances. Malarshobaa was in charge of finances of the company. He was not a cheque signatory. He did not recruit staff. He only made recommendations to Sathia. There is no evidence that the appellant had discharged any corporate duties as would be the case if he was truly a director.

[77] The fact that he demanded to know his status as a director of the company is not to be equated with him abandoning his status as an employee. The appellant was at all times an employee. There was no explanation by the company worthy of any consideration regarding the description "Basic Pay" in two of the appellant's director slips (February and March 2017). The judge said that the EPF contribution was made voluntarily. But there was no evidence to establish on a balance of probabilities that the appellant had voluntarily agreed for deductions to be made towards EPF contributions.

[78] As for the issue of misconduct, it was submitted for the company that the events that occurred on 12 March 2018 suffice as an inquiry. In our view, the incident on 12 March 2018 was hardly an inquiry. As we said earlier, the appellant was ambushed and pushed into a corner. He had no choice but to just walk out. This is a classic case of constructive dismissal.

(See: (i) *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1988] 1 CLJ 4; [1988] 1 CLJ (Rep) 298; [1988] 1 MLJ 92 (SC); and (ii) *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197; [1998] 2 MLJ 599 (CA)).

[79] The Industrial Court's findings that the appellant was a workman and that he had been dismissed without just cause or excuse are findings which are in the circumstances, immune from being vitiated *via* judicial review unless it can be demonstrated that the Industrial Court had committed "errors of law". We have scrutinised the award. We do not find any error of law and the Industrial Court was perfectly entitled to arrive at the conclusions as seen in the award – that the appellant was not the directing mind and will of the company and that he was a workman who had been dismissed without just cause or excuse.

[80] It is relevant to emphasise that the role and jurisdiction of the High Court in a judicial review application is limited and is circumscribed by the principle that findings of fact are not to be interfered with unless the decision was premised on "no evidence" or was "irrational".

[81] In this regard, the decision of the Court of Appeal in *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501; [2006] 3 MLJ 493; [2006] 3 AMR 555 per Mohd Ghazali Yusoff JCA is relevant and instructive. The principles were summarised and stated as follows:

A [42] From the authorities discussed above, I would think that in dealing with judicial review a judge should have the following principles, *inter alia*, in the forefront of his mind:

(i) judicial review is *not an appeal from a decision but a review of the manner in which the decision was made;*

B (ii) the High Court is *not entitled* on an application for judicial review *to consider whether the decision itself, on the merits of the facts, was fair and reasonable;*

(iii) the High Court, through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this C would certainly be so as s. 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;

D (iv) the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act is to *determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman* and if so, whether such grounds constitute just cause or excuse for the dismissal;

E (v) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;

(vi) the *High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and* F *further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.* (emphasis added)

[82] In conclusion we would repeat what the Federal Court had enunciated G in *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5; [1981] 1 MLJ 304:

(i) the question whether the appellant was a workman within the meaning of the Industrial Relations Act 1967 was a mixed question of law and fact.

H (ii) whether he had been dismissed without just cause or excuse was a pure question of fact.

(iii) no order of *certiorari* could lie for error on those two grounds.

[83] In conclusion, it is relevant to refer to the following cases to illustrate I that merely being a company director does not preclude that person from carrying out functions and duties as an employee and to be "remunerated" as such. In those circumstances, the label of "director" will take a backseat

and the Industrial Court will forensically examine the nature and function of the person to determine whether he was working under a contract of service (workman) or under a contract for services (independent contractor). In the case of *Rajathurai Suppiah v. Starship Agencies Sdn Bhd* [2015] 1 LNS 1013, [2015] MLJU 798, it was held by Lee Swee Seng J (as His Lordship then was):

> [59] *There is nothing unusual about a director of a company being at the same time, an employee of the company, employed as an executive director of a company and drawing a salary.* In the Singapore Court of Appeal case of *Lim Hin Hock v. Ong Jin Choon & Anor* [1991] 1 MLRA 828, Justice Chao Hick Tin JCA opined as follows:
>
> > It is clear that *a director, as such, is not an employee of the company. But a director can hold a salaried employment in addition to his directorship and in that circumstance he will be an employee.* It was not in dispute that as an executive director, the plaintiffs work involved financial administration, meeting prospective customers and entertaining them and soliciting business. The business of the two companies was in the shipping field involving loading and unloading and providing supplies to ships ... (emphasis added)

[84] In *Metatrade*, the claimant had attended directors' meeting, signed board resolutions, been made a signatory respecting the company's cheques and banking documents and represented the company at public functions did not change the fact that he was an employee and a workman. This may be contrasted with the present case were there was a paucity of evidence that the appellant had even performed any tasks as a corporate director.

[85] It was established in the case of *Henry Eliathamby v. Tootpay Sdn Bhd* [2018] 4 ILR 22, that by merely being a director of a company, does not restrict the director from also being an employee. In *Henry Eliathamby* the Industrial Court held that:

> Based on all the evidence adduced, there had been an implied contract of service, despite the lack of the letter of appointment. Just because he had been a Director of the Company, it had not taken away his right to also be its employee and be entitled to his wages and statutory contributions. There is no bar for an employee/workman to also be appointed as a Director of a Company.

[86] In the present appeal, it was contended that the appellant worked independently as he was the "person in charge" of the company and that the other directors did not interfere in the business. This was rejected by the Industrial Court which had made a finding that:

> COW-4 (Kalaiselvan) during cross-examination gave evidence that the Claimant was not in charge for the 16 expenses of the Company. COW-4 in fact testified during cross-examination that **the Claimant also reported to a Finance Director,** named SM Malarshobaa …
>
> (emphasis added)

[87] The Industrial Court also concluded the company's assertion that the appellant was in charge of hiring staff was untrue, as he never hired any staff during his employment in the company and staffs were former staffs from old Sealand, except Prem Kumar (COW7) who was recommended by the appellant to Sathia, who accepted him.

[88] The Industrial Court also found that there was not a shred of documentary evidence to show that there was a directors' meeting to review the performance of the appellant or that any instructions were given to him to bring in new businesses. The appellant's job scope was only as an operation director. He has never been involved in any essential duties of a director as enshrined in the Companies Act 2016. The company had failed to prove their allegation to show that the appellant was the brain and controlling mind of the company.

[89] It is important to reiterate what was enunciated by the Federal Court in *Hoh Kiang Ngan* (p. 702 CLJ):

> … it is the functions of and the duties actually discharged by the particular claimant that is important and **not merely the label that is attached to the particular employment** or indeed the purpose of the engagement.
>
> (emphasis added)

[90] As for the issue of the appellant's alleged misconduct, quite clearly, the issue as to whether the evidence of the staff of the company who had all testified against the appellant at the hearing was credible, or should be rejected, is a matter for the Industrial Court to decide.

[91] In this case, the Industrial Court had implicitly rejected the evidence of the witnesses who testified for the company in relation to the appellant's alleged behaviour and interaction. We do not think that on the facts and circumstances as presented to the Industrial Court, the High Court should have interfered with these findings of facts. In arriving at our conclusion, we are guided by the decision by the Court of Appeal in *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; [2000] 2 MLJ 600 ("*Quah Swee Khoon*") with regard to the High Court's limited supervisory jurisdiction. The passage from *Quah Swee Khoon* reads (relevantly) as follows:

> It is not open for a court in judicial review proceedings to exercise appellate powers. If a judge to whom an application is made for *certiorari* inquires into and disturbs finding of facts based on the credibility of witnesses, he is actually exercising appellate functions. Therefore, it must be concluded that the finding of perversity is merely a guise for interfering with findings that are only capable of being corrected in the exercise of appellate jurisdiction. As such, the learned judge had clearly exceeded the parameters of its *certiorari* jurisdiction in quashing the award on this ground …

[92] Thus, for the reasons as stated and discussed above, it is quite clear to us that in the present appeal the judge had exceeded the parameters of *certiorari* jurisdiction.

Outcome

[93] As such, the appeal is allowed and the High Court's order on 29 July 2020 is set aside. The award of the Industrial Court is reinstated. We ordered costs of RM20,000 (subject to allocator) to the appellant as costs here and below.